A

LETTER

CONCERNING

LIBELS, WARRANTS,

THE

SEISURE of PAPERS,

AND

SURETIES for the PEACE or BEHAVIOUR;

WITH A

VIEW to ſome late PROCEEDINGS,

AND THE

DEFENCE of Them by the MAJORITY.

WITH THE

POSTSCRIPT and an APPENDIX.

The SIXTH EDITION.

The Child may rue, that is unborn,
The Hunting of that Day. CHEVY CHASE.

LONDON:

Printed for J. ALMON, oppoſite *Burlington Houſe* in *Piccadilly*. 1766.

Books juſt printed for J. ALMON, oppoſite *Burlington-Houſe* in *Piccadilly*.

I. AN IMPARTIAL HISTORY of the LATE MINORITY. Exhibiting the CONDUCT, PRINCIPLES, and VIEWS of that PARTY, during the Years 1762, 1763, 1764, and 1765. With ORIGINAL PAPERS. Price bound. 5s.

II. The DEBATES and PROCEEDINGS of the BRITISH HOUSE of COMMONS, during the third, fourth, and fifth Seſſions of the third Parliament of his late Majeſty GEORGE II. held in the Years 1743, 1744, 1745, and 1746. Compiled from AUTHENTIC PAPERS, and compared with the JOURNALS.

Theſe Debates, many Speeches in which were furniſhed by the Speakers themſelves, and all of them have been compared with authentic Notes taken in the Houſe, are arranged partly upon the ſame Plan with CHANDLER's Collection, which is brought down to the Year 1742; as is alſo TORBUCK's; but with ſuch Improvements from the Journals, and other authentic Papers, as render it a Work eſſentially uſeful to every Lover of Conſtitutional Hiſtory, and worthy the Notice of every Britiſh Legiſlator.

The CONTINUATION of this intereſting Work is in great Forwardneſs, and will be publiſhed early next Seaſon.

III. The PASSENGER. A new Paper, publiſhed Weekly, Price Two-pence Halfpenny each Number. The Firſt of which was publiſhed on *Saturday* the 26th of *April*, 1766.

IV. A Collection of the moſt valuable Tracts which have been lately publiſhed in England and America, on the Subjects of taxing the Britiſh Colonies, and regulating their Trade. In two Volumes, Price 14s. bound.

V. A Collection of the moſt eſteemed Tracts which appeared during the Years 1763, 1764, and 1765, upon the Subjects of General Warrants, Seizure of Papers, Publication of Libels, Diſmiſſion of Officers, the Finances, the late Changes, &c. &c. In five Volumes. Price 1l. 10s. bound.

VI. A Collection of the moſt intereſting Letters, which appeared in the Public Papers from the Autumn Negociation in 1763, to the Change of the Adminiſtration in 1765. In one Pocket Volume, Price 2s. 6d.

LETTER

TO

MR. ALMON,

BEING AN

ENQUIRY, &c.

SIR,

SOME weeks after my ſon's ſending you *A Letter to the Public Advertiſer*, I was ſurprized with the ſight of a * pamphlet, wherein a contrary doctrine is conveyed, altho' I cannot ſay directly affirmed; from which laſt circumſtance I gueſs it to be the work of ſome enterprizing Attorney, retouched by his Superior, who has ventured to aſſert in print, what I do not remember to have heard any one gentleman avow in parliament, and for that reaſon, among others, has attracted my notice and indignation.

Indeed, the diſcourſe of late has run ſo much upon libels, warrants, and reſolutions of parliament, that every body's thoughts have been turned to theſe points. Now, I do not think myſelf at liberty to ſcan the private actions of any man, but have a right to conſider the conduct of every man in public; and to approve or to condemn his doings as they appear to me to be calculated, either for the good or the hurt of his Country.

A King of England may be conſidered in two reſpects, either in a public or private capacity. In the latter he may, as a man, indulge his own humour, in the eſtabliſhment of his houſhold and the choice of his immediate ſervants. But in the former, he is wholly a creature of po-

* The Majority defended.

lity; his crown, his power, and his revenue are derived from and circumſcribed by act of parliament. He is indeed the firſt in rank of the three independent parts of the legiſlature, and the executive hand of the whole; but the miniſters and officers by which he carries on the government, are the ſervants of the community, and the public weal is the ſole object of the entire political frame. In order, however, to preſerve a proper reſpect and chaſtity of Idea with regard to the crowned head, the royal name is never to be introduced into any queſtion of public tranſactions. With this view it is eſtabliſhed as a maxim, *The King can do no wrong.* In truth, he is ſuppoſed to do every thing by the advice of his counſel and miniſters. The ſpeeches from the throne; treaties of peace and war; the application of public revenue; appointments to offices in the ſtate; the direction of crown proſecutions; and, in a word, every other act of government muſt therefore be always debated, queſtioned, and blamed as the acts of the miniſter. As nothing can be done in a limited monarchy, but what ſomebody is to be accountable for it, ſo every miniſter in his department is to be reſponſible accordingly, and to act at his peril.

There is no inſeparable connection between a miniſter and the ſovereign. The latter is not, by the duty of his office, to ſupport any one man againſt the general ſentiments of his people; and of courſe, whatever is ſaid or written againſt the adminiſtration, is not to be regarded as an attack upon his throne. Indeed, were it otherwiſe, no act of a miniſter could ever be arraigned, and no liberty of the preſs exiſt; for, every enquiry, and cenſure in print, would be ſowing ſedition, if not high treaſon, in the ſtate.

By the old conſtitution, and afterwards by Magna Charta, no man could be put upon his trial for any offence, until a grand Jury had found a bill of indictment, or, of their own knowledge, made a preſentment thereof. By degrees, however, and by virtue of particular ſtatutes, crimes againſt the peace became preſentable by conſervators or juſtices of the peace. In proceſs of time, miſdemeanors came to be proſecuted by an information filed by the King's coroner or Attorney, that is, the maſter of the crown office; and this was conſidered as the preſentment of the King. A petty jury was afterwards to try the

the truth of every ſuch indictment, preſentment or information. But, Henry the 7th, one of the worſt Princes this nation ever knew, procured an act of parliament which, after reciting many defects and abuſes in trials by jury, and pretending a remedy for the ſame, gives a ſummary juriſdiction to certain great officers of ſtate, calling to them a biſhop, to ſummon, try and puniſh of their own mere diſcretion and authority, any perſons who ſhall be accuſed of the offences therein very generally named and deſcribed. In ſhort, the court of ſtarchamber is, by this act, ſo enlarged in its juriſdiction, that it may be ſaid to be erected, and both grand and petit juries in crown matters are in great meaſure laid aſide, as the Attorney-general now brings every thing of that ſort before this court, which, by its conſtitution, never can make uſe of either. In lieu of an indictment or preſentment of their peers, people of all degrees are put on their trial by a charge framed at the pleaſure of the Attorney-general, called an information, and filed by him *ex officio*, without even the ſanction of an oath; and the ſtar-chamber decide thereon moſt conſcientiouſly, but, as moſt true courtiers would wiſh to do, without the intervention of a jury. The faces of the ſubject are ſo ground by this proceeding, that every body at length is alarmed, and the people in ſtruggling with the crown happening to get the better, the patriots of the time ſeized an occaſion, towards the latter end of the reign of Charles the Firſt, to extort from that martyr to obſtinacy, an act for the abolition of this moſt oppreſſive juriſdiction. But, by ſome fatality, the Attorney-general's information, was overlooked and ſuffered ſtill to remain, and the uſe that is now made of it every body knows. It is reported, however, that my Lord Chief Juſtice Hale had ſo little opinion of the legality of this kind of informations, that he uſed to ſay, "If ever "they came in diſpute, they could not ſtand, but muſt "neceſſarily fall to the ground."

It was alſo long thought, they could not be filed where the King was immediately concerned, and ſo the old books ſay; but, it is now certain that they are not limited by any thing beſides the diſcretion of the Attorney-general, who is an officer of the Crown, *durante bene placito*, and not upon oath. They may, in time, become an ordinary engine of Adminiſtration, as much as any Gazette

or common courier. Indeed, the ſecreſy, eaſe, and certainty of laying a man under a heavy proſecution in the Crown-office, without any controul, by this mode of information, are what render it much more formidable than the common, regular information, which, by virtue of a ſtatute paſſed ſoon after the revolution, can not now be filed, for any treſpaſs or miſdemeanor, without expreſs order of the King's Bench, and the Informers entering into a recognizance to pay coſts to the Defendant if acquitted upon the trial, or if ſuch informer do not proceed within a year, or procure a *Noli Proſequi*. The Attorney-general, however, informing *ex officio* never pays any coſts: ſo that he may harraſs the peace of any man in the realm, and put him to a grievous expence, without ever trying the matter at all. Indeed, the coſts of the Crown-office are ſo enormous, that any man of middling circumſtances, will be undone by two or three plunges there. Moſt Bookſellers and Printers know this very well, and hence ſo few of them can be got to publiſh a ſtricture upon any adminiſtration.

It is a power, in my apprehenſion, very alarming; and a thinking man cannot refrain from ſurprize, that a free people ſhould ſuffer ſo odious a prerogative to exiſt. It has been, and may moſt certainly be again, the means of great perſecution. In truth, it ſeems to be a power neceſſary for no good purpoſe, and capable of being put to a very bad one. For, although a man may doubt whether a Grand Jury in times of violent party, would always find a bill of indictment or preſent, yet there can be none but that a Court of *King's Bench* would grant an information, wherever it could, by any Adminiſtration, be applied for with the leaſt foundation. It is ſtill more wonderful that, ſince this prerogative is endured, there has been no act paſſed to ſubject the Attorney-general, provided he did not purſue his information, or upon trial was nonſuited, or had a verdict againſt him, to the payment of full coſts to the party abuſed.

When L. H. was of the Cabinet, and at the head of the law, the Attorney-general filed an information *ex officio* againſt a Vice-Chancellor of Oxford, and, after putting him to a vaſt expence, juſt before trial entered a *nolle proſequi*. Soon after he filed another information for the ſame offence, and, when a like expence was incurred, entered

entered another *nolle prosequi*. In short, this politico-legal game was had resort to, because there was no evidence to convict, and was dropped and renewed in order to oppress, to the extreme charge of the worthless Doctor, and to the infinite discredit of a moderate king. During the reign of this Law-Lord, the same Star-chamber weapon was frequently brandished, like *Medusa*'s head, to terrify and benumb individuals. A secret and efficacious method of preserving the peace! Many an useful publication has been nipped in the bud by an information *ex officio* (that great suppressor of truth) and by the gripe of its executioner, (that enemy to light) the messenger of the press. The miserable object of it has been frequently awed into giving security for his future behaviour, without any legal ground either for that or for the prosecution; and in this ignominious state of apprehension uncertainty and bondage has he been kept for years together, without the information being withdrawn or the Surety given up.

The oppression, however, can go no farther; for, if the trial proceeds, that security of Englishmens rights, a Jury, must be called in. Some late statutes, however, (I should just observe) in particular instances have given a summary and final jurisdiction to Justices of the Peace, in matters of Excise, Game, &c. where the proceedings and decisions are arbitrary, vexatious and partial enough I believe; but this does not reach to such a length as to endanger, perhaps, the Constitution itself.

There is no offence which is oftener prosecuted by an information, *ex officio*, than a libel. Now, many Judges before the Revolution, and perchance some since, have said that, in law, a paper may be a libel, whether the charges in it be true or false, against a good or a bad man, the living or the dead; nay, that the truth of it is even an aggravation of the crime: that every libel is, by construction of law, against the peace, and (in very late times) that it is an actual breach of the peace; and (at last) that securities for the good behaviour may be demanded of any man, charged with being the Author, Printer or Publisher. After all, I do not yet learn by what certain signs one can know whether any particular pamphlet or paper will induce any body to commit a breach of the peace.

I think

I think one may say of the Lawyers, who have thus matured the doctrine of informations, that they have been very astute in the forging of chains for mankind. Nothing, indeed, can be added but the revival of a position, to be met with likewise in some few cases before the Revolution, that a Jury is only to try the fact of publication, and must leave the intention of the words to the Court, for their construction; unless, indeed, it could be contrived to get rid of Juries intirely, that is, to establish in perfection the Star-Chamber anew. Already, almost any thing that a man writes may, by the help of that useful and ingenious key to construction, an inuendo, be explained to scandalize Government, and of course be a libel; and could the last mentioned impediments be totally removed, instead of being only now and then got the better of by the dexterity of a Judge, no writing whatever could possibly escape conviction.

However, it is only in conformity with common parlance, that I speak of law and fact in a libel as distinct things; to myself they appear to be inseparably united. For, a criminal prosecution and trial can only be had for a crime; now the mere simple publication of any thing not libellous (there being no public licenser) is no crime at all; it is then the publication of what is false, scandalous and seditious, that is the crime, and solely gives jurisdiction to the criminal Court; and That therefore is what must, of necessity, be submitted to the Jury for their opinion and determination. A decisive argument to the same purpose may be drawn from the conduct of the Lawyers themselves in this very matter. For, it is agreed, on all hands, to be necessary for the Crown-Pleader to set forth specially some passages of the paper, and to charge it to be a false, or malicious libel. Now, this would never be done by the Law-Pleaders, submitted to by the Attorney-General, or endured by the Judges, if it was not essential to the legality of the proceeding. The King's-Bench, in granting the information, only act like a Grand Jury in finding a bill of indictment, and in effect say no more than this, That, so far as appears to them, the paper charged seems to be a libel, and therefore the person accused should be put upon his trial before a Jury, whose business it will be to enter thoroughly into the matter, hear the evidence examined, and what the Council can say on both sides, and form

from thence form a judgment upon the whole, which, after ſuch a diſcuſſion, it will not be difficult for any men of common underſtanding to do. Whether the contents of the paper be true, or falſe, or malicious, is a fact to be collected from circumſtances, as much as whether a treſpaſs be wilful or not, or the killing of a man be with malice forethought. "Whether any act was done or "any word ſpoken, in ſuch or ſuch a manner, or with "ſuch or ſuch an intent, the Jurors are Judges. The "Court is not Judge of theſe matters, which are evi-"dence to prove or diſprove the thing in iſſue." This is our law, both in civil and criminal trials, altho' the latter are by far the moſt material, becauſe what affects our perſon, liberty, or life, is of more conſequence than what only affects our property.

Were I therefore a Juror, I ſhould take nothing implicitly or upon truſt, in this reſpect, from any man, but ſhould endeavour to form my own judgment of the matter as an impartial Juror, and not as a Stateſman: plain truth and fact, and common ſenſe, and not political convenience, far-fetched inference, or ingenious inuendo, being the proper object and intent of my oath by the law of the land. "The verdict itſelf is not an act miniſterial "but judicial, and where the Jurors give it according to "the beſt of their judgment, they are not finable. They "can only be puniſhed by attaint, that is, by another "Jury, where it ſhall be found, that wilfully they gave a "verdict falſe and corrupt. Indeed, were this not ſo, "they would be but mere ecchoes to ſound back the plea-"ſure of the court." Whereas, Judges cannot refuſe to receive a Jury's verdict.

The ſtrict law, I know, is pretended to be, that the truth of the matter aſſerted is no defence againſt the charge of its being a libel; but that is a point which I ſhall never be prevailed upon to receive as law, from the authority of any man whatever; and much the leſs ſo, for the faſhion now introducing (for the firſt time ſince the Revolution) of proceeding againſt Printers after the Author is known, which breathes a ſpirit of perſecution (I may ſay of cruelty) hardly to be endured.

The ſtatutes againſt Slander and Scandalum Magnatum, (namely the 3d Ed. I. 2d and 12th Ric. II.) direct only that he who "ſhall be ſo hardy to tell or publiſh any falſe "news or tales, whereby diſcord or ſlander may grow

"between

" between the King and his people, or the great men of " the realm, ſhall be taken and kept in priſon, until he " has brought *him* into the Court *which was the firſt Au-* " *thor of the tale.*"

If an Attorney-General finds it neceſſary in law to charge a paper to be falſe, in order to render his information againſt it, as a libel, legal; and that his informing againſt it for being a *true* libel, would not only be ridiculous, but bad in law, he ſhould prove it to be falſe, or I would never upon my oath find it to be ſo, let what meaſure or what magiſtrate ſoever be the object of it; in reality, it would be abſurd to do otherwiſe. The diſtinction between words ſpoken and words written is moſt curious. For no criminal proſecution lies for words ſpoken, and none are even actionable in themſelves that do not impute a *crime*; their truth may be pleaded in juſtification, no inuendo is permitted, a Jury aſſeſſes the damages, and no greater coſts than damages can be recovered. The calling of foul names, uſing of abuſive, reproachful or ridiculing language, or the ſpreading of falſe or diſparaging ſtories, (unleſs againſt a Peer, &c.) is not in itſelf actionable at all; and to ground an action for ſuch ſcandal and defamation, ſome ſpecial damage muſt be alledged and proved. Otherways you can only proceed in the Court-Chriſtian for an eccleſiaſtical cenſure. But, if the ſame words are committed to paper, the writer is a libeller, may be indicted, or informed againſt; is admitted to plead nothing in his juſtification, and if found guilty, may be fined and corporally puniſhed, as the *King's Bench* Judges ſhall think fit.

In truth, the Crown, in a libel, ſhould not only prove the words to be falſe, but likewiſe ſhew, either from the nature of the paper itſelf, or from external proof, that it was malicious as well as falſe, or I would acquit the defendant. For, if this were not likewiſe requiſite, it might very well happen, that a ſober and temperate man, who wrote very juſtly upon the whole againſt a bad miniſtry, might have been miſinformed, touching ſome particular fact; and then the Attorney-General, after admitting or not conteſting twenty other charges, might lay his finger upon this ſingle one, and ſhew it to be falſe, and thereupon inſiſt upon having made good his information. In ſuch caſe, I ſhould conſider whether it was maliciouſly or wantonly, that the author had publiſhed ſuch an untruth,

or

or whether common fame ſupported him in it, and ſhould acquit or condemn him accordingly; for, common fame has been reſolved to be a good ground of accuſation.

In ſhort, the whole of the information is given in charge to the Jury, and if they find him guilty at all, they muſt find him guilty of the whole, that is, that by publiſhing a paper of ſuch a nature he is guilty of a libel; and if they do find this, it is not in the power of the King's-Bench afterwards to determine that the ſame was no libel. Therefore the charge both of the falſehood and the malice of the paper accuſed, as well as the fact of publication, ſhould be made appear, or the Author and Publiſher ſhould be acquitted. The very ſtatutes againſt ſlandering great men puniſh no other than *falſe* news and tales, *horrible and falſe* lies.

Judge *Powell*, in the trial of the ſeven Biſhops, ſpeaking of their petition, which was charged as a libel, in the information, ſaid, "To make it a libel, it muſt be falſe "and malicious, and tend to ſedition;" and declared, "As he ſaw no falſehood or malice in it, that it was no "libel." The other three Judges, it is true, were of a different opinion; but their opinion has ever ſince been held infamous, and his in the utmoſt veneration. Sir *Robert Sawyer*, as Council, farther inſiſted, in the ſame trial, that "the falſity, the malice, and *ſedition* of the writing, "were *all* facts to be proved." And it is ſaid, that Lord Chief Juſtice *Holt* always aſked, "Can you prove this to "be true? If you write ſuch things as you are charged "with, it lies upon you to prove them true, at your "peril;" and a man runs riſk enough in being forced to do this. Mr. *Hawles*, in his excellent Treatiſe upon the duty of Petty Juries, called *The Engliſhman's Right*, ſays, "When the matter in iſſue, is of ſuch a nature, as "no action, indictment or information will lie for it "ſingly, but it is worked up by ſpecial aggravations into "matter of damage or crime, as, that it was done to "*ſcandalize the government*, *raiſe ſedition*, *affront autho-* "*rity*, or the like, or with ſuch or ſuch an evil intent: "if theſe aggravations, or ſome *overt* act to manifeſt ſuch "ill deſign be not made out in evidence, then ought the "Jury to find the party *Not Guilty*. And if a Jury ſhall "refuſe to find that ſuch an act was done *falſly*, *ſcanda-* "*louſly*, *maliciouſly*, with an intent to *raiſe ſedition*, *de-* "*fame the government*, or the like, their mouths are not

" to be ſtopped, or their conſciences ſatisfied, with the " Court's telling them, *you have nothing to do with that,* " *it's only matter of form or matter of law, you are only* " *to examine the fact, whether he ſpoke ſuch words, writ* " *or ſold ſuch a book, or the like:* for, if they ſhould igno- " rantly take this for an anſwer, and bring in the priſoner " *Guilty*, tho' they mean of the *naked* fact only, yet " the Clerk recording it demands a further confirmation " thus, *Then you ſay D. is guilty of the treſpaſs or miſde-* " *meaner in manner and form as he ſtands indicted, and ſo* " *you ſay all?* And the verdict is drawn up, *The Jurors* " *do ſay, upon their oaths, that D. maliciouſly, in contempt* " *of the King and the government, with an intent to ſcan-* " *dalize the Adminiſtration of Juſtice, and to bring the ſame* " *into contempt, or to raiſe ſedition*, &c. (as the words " were laid) *ſpake ſuch words, publiſhed ſuch a book, or did* " *ſuch an act, againſt the Peace of our Lord the King, his* " *crown and dignity.*"

Beſides, there is a conſtitutional reaſon of infinite moment to a free people, Why a Jury ſhould of themſelves always determine whether any thing be or be not a libel. It is this, that ninety-nine times out of an hundred, theſe informations for public libels are a diſpute between the miniſters and the people. Our Progenitors knew this very well, and therefore having acquieſced in the power exerciſed by the Attorney-General, of informing againſt what he pleaſes as a libel, were reſolved not to part with the prerogative of judging finally upon the matter themſelves; and, in my poor opinion, had they done ſo, we ſhould, long before this, not only have loſt the liberty of the preſs, but every other liberty beſides. No man that diſapproved the meaſures of a court, would venture to diſcuſs the propriety or conſequence of them. No man would venture to utter a ſyllable in print againſt any power of office, and much leſs againſt any royal prerogative, however illegally uſurped. He would be ſure to be charged with a libel by the Attorney-General, and to be fined, and perhaps impriſoned without mercy, by the *King's Bench*, as, in fact, happened to Sir Samuel Bernardiſton, whoſe judgment was reverſed by Parliament after the Revolution.

Before that glorious æra, the Judges held their places at the King's pleaſure, and acted accordingly. Their oath

was

was then their only reſtraint; that was ſome guard, but not a ſufficient one, when the conſequence of a non-compliance with Adminiſtration would deprive a Judge of his livelihood, and raiſe the indignation and reſentment of the Crown. Judges are now for life, and a noble ſecurity it is; and yet, unleſs one could inſure them from the common failings of mankind, from ambition, avarice, or the deſire of providing for their families, one may eaſily conceive that ſome influence may ſtill take place even in a Judge.

But it is become more neceſſary than ever, that the people ſhould retain the privilege of determining the law and the fact, relative to libels, becauſe their repreſentatives have lately, by a reſolution, declared, that *privilege of parliament does not extend to the caſe of a libel.* I had been always in an error upon this head before, which I was led into by old caſes. My notion was not taken up in conſequence of the conſtruction made by the preſent Court of Common Pleas, nor did I, indeed, entirely build upon my own ſenſe of the matter; but I was fixed in the opinion by the authority of that great lawyer Lord Chancellor *Egerton*, who, after having held the great ſeal for fourteen years, with greater reputation than any man before him, in a ſolemn argument which he delivered in the caſe of the *Poſt-Nati*, and which he afterwards publiſhed himſelf, upon a ſtrict review, and with great deliberation, (ſo that it is uncontrovertibly his opinion) has laid down the ſame doctrine, and cites particularly the old determination made by the Judges in the caſe of Thorpe. His Lordſhip there ſays, " Then let us ſee what the wiſdom of parliaments " in times paſt, attributed to the Judges opinions declar- " ed in parliament, of which there may be many exam- " ples. In the parliament anno 31 H. 6, in the vacation " (the parliament being continued by prorogation) *Thomas* " *Thorpe*, the Speaker, was condemned in a thouſand " pounds damages, in an action of treſpaſs brought againſt " him by the Duke of *York*, and was committed to priſon " in execution for the ſame. After, when the parliament " was re-aſſembled, the Commons made ſuit to the King " and the Lords, to have *Thorpe*, the Speaker delivered, " for the good exploit of the parliament; whereupon the " Duke of York's counſel declared the whole caſe at " large. The Lords demanded the opinion of the Judges,

" whether, in that caſe, *Thorpe* ought to be delivered " out of priſon by privilege of parliament: the Judges " made this anſwer, That they ought not to determine " the privilege of that High Court of Parliament; but, " for the declaration of proceeding in lower Courts, in " caſes where writs of ſuperſedeas for the privilege of the " parliament be brought unto them, they anſwered, " That if any perſon that is a Member of Parliament be " arreſted, in ſuch caſes as be not for treaſon or felony, or " for *ſurety of peace*, or condemnation had before the " parliament, it is uſed that ſuch perſons be releaſed, and " may make Attorney, ſo as they may have their freedom " and liberty freely to attend the parliament."

The Lords, in the following reign, moſt ſolemnly ratified this doctrine in the famous caſe of the Earl of *Arundel*, by a reſolution *nemine contradicente*; and then preſented to the King, the following remonſtrance, " May " it pleaſe your Majeſty, we the Peers of this your realm, " now aſſembled in parliament, finding the Earl of " *Arundel* abſent from his place, that ſometimes in this " parliament ſat amongſt us, his preſence was therefore " called for; but, hereupon a meſſage was delivered unto " us from your Majeſty by the Lord Keeper, that the Earl " of *Arundel* was reſtrained for a *miſdemeanor*, which was " perſonal to your Majeſty, and had no relation to matter " of parliament: this meſſage occaſioned us to enquire " into the acts of our anceſtors, and what in like caſes " they had done, that ſo we might not err in any duti- " ful reſpect to your Majeſty, and yet preſerve our right " and privilege of parliament: and after diligent ſearch " both of all ſtories, ſtatutes and records that might in- " form us in this caſe, we find it to be an undoubted " right and conſtant privilege, That no Lord of Parlia- " ment, ſitting in the parliament, or within the uſual " times of privilege of parliament, is to be impriſoned " or reſtrained (without ſentence or order of the houſe) " unleſs it be for treaſon or felony, or *for refuſing to give* " *ſecurity for the peace*; and to ſatisfy ourſelves the better, " we have heard all that could be alledged by your Ma- " jeſty's learned Council at Law, that might any way in- " fringe or weaken this claim of the Peers, and to all that " claim he ſhewed and alledged, ſo full ſatisfaction has " been

" been given us that all the Peers in parliament, upon the " queſtion made of this privilege, have *una voce* conſented " that this is the undoubted right of the Peers, and inviol- " ably has been enjoyed by them."

Now what my reaſoning from ſuch premiſes muſt be, may be eaſily gueſſed. It was thus: Members are clearly intitled to Privilege in all miſdemeanors, for which ſureties of the peace cannot be demanded. But, ſureties of the peace cannot be demanded but in actual breaches of the peace. The writing of any thing quietly in one's ſtudy, and publiſhing it by the preſs, can certainly be no actual breach of the peace. Therefore, a Member who is only charged with this, cannot thereby forfeit his Privilege.

I thought that no common man would allow any writing or publiſhing, eſpecially where extremely clandeſtine, to be any breach of the peace at all; and that none but lawyers, on account of the evil tendency ſometimes of ſuch writings, had firſt got them, by *conſtruction*, to be deemed ſo. I had no idea that it was poſſible for any lawyer, however ſubtle and metaphyſical, to proceed ſo far as to decide mere authorſhip, and publication by the preſs, to be an *actual* breach of the peace, as this laſt ſeemed to expreſs, *ex vi termini*, ſome poſitive bodily injury, or ſome immediate dread thereof at leaſt; and that, whatever a challenge, in writing, to any particular might be, a general libel upon public meaſures, could never be conſtrued to be ſo. And I knew it was not required of any one in matters of law, to come up to the faith of an orthodox divine, who, in incredible points, is ready to ſay, *Credo quia impoſſibile eſt.*

Indeed, I had originally conceived, upon a much larger ſcale of reaſoning, that freedom from arreſt for a libel was a privilege incident and neceſſary to the Houſe of Commons, becauſe it was a ſafe-guard againſt the power of the Crown, in a matter that was almoſt always a diſpute between the miniſter and the ſubject, and no more than a natural ſecurity of perſon for an independent part of the legiſlature, againſt the arbitrary proceedings of a King's officer, in the leaſt aſcertained of all imputable offences. But this point has been lately cleared up to the contrary in St. Stephen's chapel, upon a debate of two ſucceſſive days, the laſt of which continued from three in the afternoon till two in the

the morning *. And, I lament my not hearing a very long, refined and elaborate ſpeech of a certain candid lawyer, the product of family learning and patriotiſm; nor the finer wove oration of a great juſticiary; which have been highly celebrated, and were made at different times and places, in order to eaſe peoples minds of ſuch chimæras as mine, and to convince the impartial part of mankind, that a libel is not only an actual breach of the peace, but ſcarcely diſtinguiſhable in a court-lawyer's underſtanding from treaſon itſelf. Nevertheleſs, the Commons of England at large, having come to no new compact or ſurrender of ancient privileges, ſtill poſſeſs their old right of being judges of the law in a libel.

I cannot help adding too, with regard to pledges for good behaviour, that in my apprehenſion, they are not demandable by law in the caſe of a libel, before conviction; for this miſdemeanor is only a breach of the peace by political conſtruction, nothing being an actual breach of the peace, but an aſſault or battery, the doing or attempting to do ſome bodily hurt. Now, ſurety for the peace is calculated as a guard from perſonal injury; and articles of the peace can only be demanded from a man, who by ſome poſitive act has already broke the peace, and therefore is likely to do ſo again; or where any one will make poſitive oath, that he apprehends bodily hurt, or that he goes in danger of his life. The *articles* which are every day exhibited in the court of King's Bench, are always for the prevention of corporal damages. No caſe is ſo common as that of women exhibiting articles of the peace againſt their huſbands; now, I do not believe, that if any wife was to allege, as a foundation for ſuch articles, her huſband's having wrote a libel againſt her, let the libel be ever ſo falſe, ſcandalous and malicious, that Lord Mansfield would make the huſband find ſureties for the peace, or for his future good behaviour on that account. Now, in the caſe of a public libel, there is nobody who can come into the court of King's Bench and exhibit articles of the peace againſt the writer or publiſher, ſwearing that he believes himſelf to be in danger

* Vide the printed Votes of Wednesday the 23d of November 1763, and Thurſday the 24th of November 1763.

of

of bodily hurt from him, or that he walks in fear of his life.

Another reaſon which ſtrongly weighs with me is, that the writers upon bail, or the delivery of a man's perſon from priſon, never mentions ſureties for the behaviour, in any caſe of a libel or conſtructive breach of the peace; and yet it would have been material for them ſo to have done, if ſuch ſecurity muſt be given before a man could obtain his liberty. My Lord Coke has wrote an expreſs treatiſe upon bail and mainpriſe, and conſidered the writs *de homine replegiando*, *de odio & atia*, and *Habeas Corpus*, and yet it is plain he had no imagination of the thing. He ſays, "Bail and mainpriſe is, when a "man detained in priſon for any offence for which he "is bailable or mainprizable by law, is by a complete "Judge or Judges of that offence, upon ſufficient ſure-"ties, bound for his appearnce and yielding of his body, "delivered out of priſon. As for example, if a man be "indicted of any felonies, publiſhing of any ſeditious "books, &c. contrary to the form of an act made in the "23d year of Queen Elizabeth, he may be bailed, for "the offence is made felony, and bail and mainpriſe not "prohibited."

Beſides; for words ſcandalous in themſelves or attended with conſequential damages, or for a libel, the party traduced can only bring an action of treſpaſs on the caſe, which action, however, lies merely for a wrong done without force, but againſt the peace, that is, for a *conſtructive* breach of the peace. For, if it were *an actual* breach of the peace, an action of treſpaſs with force and arms would lie, as it does for an aſſault and battery and falſe impriſonment; but, I believe no lawyer ever heard of ſuch an action being brought either for words, or for a libel, or would ſay that in either caſe it would lie. This therefore is a proof that the Law does not regard a mere libel as an *actual* breach of the peace.

The notion of purſuing a libeller in a *criminal* way at all, is alien from the nature of a free conſtitution. Our ancient common law knew of none but a *civil* remedy, by ſpecial action on the caſe for damage incurred, to be aſſeſſed by a jury of his fellows. There was no ſuch thing as a public libel known to the law. It was in order to gratify ſome of the great men, in the weak reign of Richard

Richard the 2d, that ſome acts of parliament were paſſed to give actions for falſe tales, news, and ſlander of peers or certain great officers of ſtate, which are now termed *de ſcandalis magnatum*. Before that time, or at moſt the 3 Edward I. no mere words were actionable: There muſt be ſome ſpecial damages to found an action, which muſt be laid and proved. The doctrine in courts of common law ſtill continued to be, that "no writing whatever is "to be eſteemed a libel, unleſs it reflect upon ſome parti- "cular perſon." And they will not ſuſtain actions at all for obſcene diſcourſes, by word of mouth or writing, or for ribaldry. They leave ſuch ſpiritual concerns to the eccleſiaſtical cenſures of Courts-Chriſtian.

The whole doctrine of libels, and the criminal mode of proſecuting them by information, grew with that accurſed court the ſtar-chamber. All the learning intruded upon us *de libellis famoſis* was borrowed at once, or rather tranſlated, from that ſlaviſh imperial law, uſually denominated the civil law. You find nothing of it in our books higher than the time of Q. Elizabeth and Sir Edward Coke.

But if any writing ſhould be a libel, and be proſecuted only as ſuch, it is in vain afterwards to call it "abominable or treaſonable," with any idea that ſuch epithets will warrant an extraordinary proceeding in the proſecutor. This end indeed it may anſwer, and a very diabolical one it is; it may ſerve to found a pretence for demanding exceſſive bail, which if the ſuppoſed libeller cannot find he muſt lie in priſon: however, as there have ſeveral acts of parliament paſſed from time to time forbidding exceſſive bail, particularly the Habeas Corpus act, and as the Houſe of Commons have even ſince in the caſe of Lord Chief Juſtice Scroggs, expreſſed their deteſtation of ſuch oppreſſion, a Judge is not now ſo likely to put this mode of tyranny in uſe. But if the doctrine of ſecurity for the peace can be eſtabliſhed, I do not ſee what ſhould hinder a time-ſerving magiſtrate, from inſiſting upon ever ſo enormous a pledge *eo nomine*: The Judge might ſay, I have taken moderate bail; but, I found he was a man of parts, much diſ-inclined to his Majeſty's meaſures of adminiſtration, and had reaſon to think he would ſtill write againſt them, which could not fail of raiſing a dangerous ſedition, and therefore I thought the beſt way was to take ſuch a pledge for his

good

good behaviour for ſeven years, as would deter him from writing any thing that could poſſibly be deemed a libel; for if he did, he would forfeit his caution-money, and That would be ſo great a loſs, it would abſolutely ruin him. I did for the beſt; and, I do not know that there is any ſtatute which preſcribes any meaſure for ſecurity of the peace. Now, ſuppoſing a chief Juſtice was to be complained of for ſuch an oppreſſion, as a groſs fraud on the ſpirit and intention of the Habeas Corpus act, and the Houſe of Commons were to inquire into the matter; if the adminiſtration which he ſerved was then prevalent, it might perhaps be very difficult to obtain any cenſure of the practice: but, if that could be done, it is highly improbable they would go any farther; and, at the worſt, his Lordſhip would get off without any fine upon himſelf, as well as Chief Juſtice Scrooggs did. To ſay the truth, and to ſpeak out upon ſo material a ſubject, I cannot help imagining that this word *treaſonable* or *traitorous*, is frequently thrown into the charge againſt a ſuppoſed libeller by an Attorney General, for the purpoſe of affording colour for the demand of high bail, and, if poſſible, enormous ſecurity for the good behaviour.

Had this practice of ſurety for the peace upon the charge of a libel prevailed in Charles the IId's time, it is inconceivable that the legiſlature ſhould not have mentioned it by name in the Habeas Corpus act. The patriots who procured that ſtatute, evidently meant to have a delivery of the body in all caſes not capital by bail, and muſt certainly think by the words *ſpeedy relief of all perſons impriſoned for criminal or ſuppoſed criminal matters*, that they had provided for all caſes of miſdemeanor. Nay, after this, if Surety for the Peace or Behaviour had been taken in Libel, can it be conceived that it would not have been complained of and redreſſed in the Bill of Rights, as being, equally with exceſſive bail, a mean *to elude the benefit of the laws made for the liberty of the Subjects, utterly and directly contrary to the freedom of this realm, and which ought not to be required?*

It is no excuſe for this novel attempt to ſay, that Judges take the ſame ſureties for appearance and for the peace, and make the one the meaſure of the other; becauſe they are certainly not obliged ſo to do, and might

perhaps on ſome occaſion ſee reaſon to do otherwiſe; beſides, a man might forfeit his pledges for the behaviour, by ſome ſubſequent imprudence, altho' he might be acquitted of the charge which had occaſioned them, and this could never be the intention of any legiſlature.

In ſpeaking of ſureties, I have not entered into the difference between thoſe for the *peace*, and for the *good behaviour*; but the latter are certainly by much the moſt to be dreaded. For "ſurety of the peace cannot be broken "without ſome *act*, as an affray or battery, or the like. "Whereas (according to my lord Coke) ſurety *de bono* "*geſtu*, or good abearing, conſiſts chiefly in that a man "demean himſelf well in his port and company, doing "nothing that may be *cauſe* of the breach of the peace, "or of putting the people in fear or trouble." In ſhort, it affords more room for a latitude of conſtruction, or for a Judge's diſcretion, which is very apt to operate againſt the ſubject, and ſhould therefore be ſtudiouſly avoided.

The truth is, at common law, ſurety for the good behaviour could be demanded in no caſe before conviction by a jury. Binding to the good behaviour was a diſcretionnary judgment, given by a court of record, for an offence at the ſuit of the King, after a verdict; trial by his peers being an Engliſhman's birth-right in all charges, not to be taken away but by act of parliament.

"Originally, wardens or conſervators of the peace, were "wont to be elected in the full county before the ſheriff; "they had only co-ertion or prehenſion in a few caſes, and "no juriſdiction in any cauſe.

"But, when young Edward the 3d, by the means of "his mother and Sir Roger Mortimer, had forcibly got "poſſeſſion of his father's crown, He inſtituted keepers, "commiſſioners, or juſtices of the peace, as ſo many "ſpecial eyes and watches over the common people, "whereby the election of conſervators of the peace was "taken from the people, and tranſlated to the aſſignment "of the King. Theſe juſtices were not ordained how-"ever, to reduce the people to an univerſal unanimity, but "to ſuppreſs injurious force and violence againſt the per-"ſon, his goods or poſſeſſions. In this matter of the "peace (continues Mr. Lambard) the law of God re-

"ſpects

" ſpects the mind and conſcience, the laws of men do " look but to the body, hands and weapons: and there- " fore, furious geſture and beaſtly force of body (and not " every contention, ſuit and diſagreement of minds) is " the proper ſubject about which the office of the juſtices " of the peace is to be exerciſed."

Before the 2d of Edward 3, juſtices could only report to the parliament; but, by that ſtatute, they had power to puniſh diſobeyers, and reſiſters, And the 34th of the ſame king enacts, " that in every county ſhall be aſ- " ſigned for the keeping of the peace one Lord, and with " him three or four of the moſt worthy in the county, " with ſome learned in the law, and they ſhall have power " to *reſtrain misfeaſors*, rioters, and all other barrators, " and to purſue, arreſt, take, and chaſtiſe them, accord- " ing to their treſpaſs and offence; and to cauſe them " to be impriſoned and duly puniſhed, according to the " law and cuſtoms of the realm; and alſo to inform of " them; and to inquire of all thoſe that have been pil- " lors and robbers in the parts beyond the ſea, and be " now come again, and go wandring, and will not " labor as they were wont; and to take and arreſt all " thoſe that they may find by indictment, or by ſuſpicion, " and to put them in priſon; and to take *of all them* " *that be not of good fame*, where they ſhall be found, " *ſufficient ſurety and mainprize of their good behaviour* " towards the King and his people, and the other duly " to puniſh, *to the intent* that the people be not by *ſuch* " *rioters or rebels*, troubled nor endamaged, nor the peace " blemiſhed, *nor merchants nor others paſſing by the high-* " *ways* diſturbed, nor put in the *peril* which may hap- " pen of *ſuch* offenders." Now, it is plain, this ſtatute regards nothing but actual offenders, rioters, barrators, rebels and highwaymen: and ſurety for the behaviour cannot be taken thereby, but of thoſe who are on ſtrong ground ſuſpected of ſome ſuch actual breach of the peace. This law, nevertheleſs, is the origin and the ſole foundation for the preſent demand of ſureties for the good behaviour before conviction; and what is not warranted by the proviſions of this act, is illegal and unwarrantable, the common law permitting no ſuch thing, and the ſame be- ing in itſelf derogatory of the rights of a freeman.

Indeed, ſome particular ſtatutes in ſubſequent reigns, have directed ſurety for the good Abearing in caſes therein *ſpecified*. But, theſe ſpecial ſtatutes are out of the preſent queſtion, and therefore need not be touched upon here.

To return then to the 34th Ed. 3. It appears (I think) unconvertibly from the penning of that ſtatute, as well as from the acceptation of it among our anceſtors, and the conſtruction of antient lawyers, that ſecurity for good behaviour cannot be required, but where a man ſhews juſt cauſe to apprehend ſome bodily hurt to be done to himſelf. And in ſuch caſe, the peace-magiſtrate muſt convene the perſon charged, *inquire* and *find* him not to be of good fame where taken. He muſt examine into the truth of the matter alledged, try and adjudge it upon ſatisfactory teſtimony or evidence of the thing, unleſs he ſaw it with his own eyes, before he can legally demand any ſurety for good abearing, or know what to take: for, he acts judicially. In ſhort, mainprize for the behaviour, (whether by bond to the King, pledge or caution) muſt be by a regular proceeding of record. In fact, none but a judge of record (which a juſtice of peace is) can take a recognizance, becauſe the acknowledgement of the ſum is to remain as a matter of record. Every recognizance for the peace is expreſly directed by the 3d Henry 7, to be certified to the next ſeſſions. And, before the reign of James I. it was not imagined that ſecurity for the behaviour could be taken by one juſtice, and all the books in his time recommend two. Nay, binding to the behaviour, uſed always to be done in open ſeſſions; and the beſt opinions now are, that a juſtice acts illegally, if he bind any man to his behaviour for any longer time than until the next ſeſſions of the peace. My Lord Hale ſays, "This binding, tho' expreſſed generally, and without any time limitted, is not intended to be perpetual, "but in nature of bail, viz. to appear at ſuch a day at "the ſeſſions, and *in the mean time* to be of good behaviour."

Indeed, by ſupplicavit from the Chancery or King's Bench, a juſtice may be commanded to take ſurety for the good abearing of any particular perſon; and then in obedience to the writ, he muſt do ſo, for he acts only miniſterially,

ſterially. *Fitzherbert* however ſays, that after the 1 Edw. III. theſe writs begun thus, *Supplicavit nobis A quod cum ipſe* de vita et mutilatione membrorum ſuorum *per E. graviter* et manifeſtè comminatus *exiſtat, &c.* and then went on, *Tibi præcipimus quod ipſum E. ad ſufficientem ſecuritatem inveniendam quod ipſe damnum vel malum aliquod eidem A.* de corpore ſuo *non faciat nec fieri procurabit, quovis modo compellas: et ſi hoc recuſaverit, hunc ipſum E. proximæ gaolæ noſtræ committas, in eadem ſalvo cuſtodiri quouſque hoc gratis facere voluerit.* * And the ſupreme courts, are commanded by "the 21ſt James I, to grant no proceſs of the peace for good be-"haviour, but upon motion in open court, and declaration in "writing and upon oath, to be exhibited by the party deſiring "ſuch proceſs, of the cauſes for which ſuch proceſs ſhall be "granted; the motion and declaration to be mentioned on the "back of the writ; and if it ſhall afterwards appear that the "cauſes are untrue, the court may order *coſts to the party grieved*, "and commit the offender till paid." This act is profeſſedly by its preamble made to prevent ſurety for the behaviour being unjuſtly "procured upon oaths peremptorily and corruptly ta-"ken, and upon falſe ſuggeſtions and ſurmiſes," which ſhews that it is only to be awarded after a ſolemn examination into the truth of the cauſe ſuggeſted, upon ſtrong and ſatisfactory evidence in open court, in the face of mankind.

What then muſt one think of any court of juſtice that ſhall, upon the caption of a man as a libeller, refuſe to let him to bail before he has entered likewiſe into recognizance for his behaviour, and even that without limit of time? An Attorney-General, at the inſtigation of a peeviſh and ſuſpicious miniſter, may charge any paper as a libel, and any man as the author or publiſher, *ex officio*, without oath, or the ſhadow of legal proof! The information may be filed, proceſs taken out and executed, and the ſuppoſed libeller obliged to become bound in a heavy ſum for his good behaviour; and yet the information may never be tried, or withdrawn, nor the recognizance releaſed! Nay, if the ſame perſon ſhould afterwards be guilty of any petty conſtructive miſdemeanor or breach of the peace, it might be pretended that he had forfeited his former heavy recognizance; ſo that he would be puniſhed, not in proportion to his real tranſgreſſion, but to one that was only ſuppoſed: and This in a country where the law preſumes every man to be innocent until he be found guilty! In plain words, it is a libel on the conſtitution to hold ſuch doctrine, and in a judge, a breach of his truſt (which is treaſon at Common Law) to ſupport it. It would render every Engliſh ſubject, by poſſibility, a moſt miſerable fettered ſlave. Mr. Selden knew well the contrary, and therefore

* Natura Brevium, p. 184.

fore ſuffered himſelf to be re-impriſoned rather than ſubmit to ſo lawleſs a demand of the crown, and in his own perſon to afford a precedent for what might afterwards be attempted againſt others of his fellow-ſubjects. He was a great lawyer and a true repreſentative of the people in parliament, in oppoſition to the tyrannical procedure of an arbitrary court and its ſubſervient judges, that would have held every man *in miſericordia regis*, if they could.

Having ſeen what the words of the ſtatute, creating this power are; let us now look at the commiſſion for the peace framed in conſequence of it: premiſing that no uſage, royal proclamation, or expoſition of a judge, will make law in this caſe, that is not warranted by the expreſs words of the ſtatute, and that the ſame being a penal ſtatute it muſt be conſtrued ſtrictly.

The clauſe in the old commiſſion of juſtices of the peace, authorizing them to take ſurety of the peace or good behaviour, confines the ſame to actual breaches of the peace, that is, threats of bodily injury, or the burning of their habitations, and is in theſe words, " ad omnes illos qui alicui de populo " noſtro de *corporibus ſuis*, vel de *incendio domorum* ſuarum *minas* " *fecerint*, ad ſufficientem ſecuritatem de pace vel de bono geſtu, " erga nos & populum noſtrum inveniendam, &c." And the words ſettled in James the 1ſt's time and now purſued, are, " To keep, and cauſe to be kept, all ordinances and ſtatutes " for the good of the peace, &c. and to chaſtiſe and puniſh all " perſons that offend, according to the form of thoſe ſtatutes " and ordinances; and to cauſe to come before you all thoſe, " who to any of our people *concerning their bodies*, or the " *firing of their houſes*, *have uſed threats*, to find ſufficient ſecu- " rity, for the peace or their good behaviour towards us " and our people; and, if they ſhall refuſe to find ſuch ſecu- " rity, then them in our priſons until they ſhall find ſuch ſe- " curity to cauſe to be *ſafely kept*. We have alſo aſſigned you " to *inquire the truth more fully* by the oath of good and lawful " men, &c. of all thoſe who in companies againſt our peace, " in diſturbance of our people, have gone or rode, or hereafter " ſhall preſume to go or ride; and alſo of all thoſe who have " there lain in wait, or hereafter ſhall preſume to lie in wait, " to maim, or cut or kill our people."

Now, this commiſſion is grounded evidently on the ſtatute of Edward the 3d, derives its force from it, and needs no comment to apply thereto the ſeveral parts of it. It confirms abundantly the doctrine I have advanced. Indeed, the legality of requiring ſurety of good behaviour for Arſon, ſeems very queſtionable, as not compriſed within the act. However, nobody will object to it, as being a ſecurity againſt being burnt in one's bed,

by

by any man who ſhall threaten, or, by lurking about the houſe at night, ſhall indicate an intention of ſo doing. *Fitzherbert*, the Judge, in his *Natura Brevium* (which is of ſuch eſtabliſhed authority in all the courts of law, from the reputation of the learned author, and the annotations of Lord Chief Juſtice *Hale*) in treating of the writ *de ſecuritate pacis*, ſays, "This writ lies "when a man is in fear or doubt that another will beat or aſ- "ſault him; and lies properly where one man does threaten an- "other to kill him, beat him, or aſſault him; then may he "pray to have ſuch a writ—*Quia conqueſtus eſt quod ei* de cor- "pore ſuo manifeſté minatur: and the King's writ runs *præci- "pimus tibi, quod eidem A. de præfato C. firmam pacem noſtram*, "ſecundum conſuetudines Angliæ, *habere facias, ita quod ſecurus "ſis quod eidem A.* de corpore ſuo *per præfatum C. vel per procu- "rationem ſuam damnum vel periculum non eveniat.* And by the "antient courſe of law he ought to take his oath upon a book, "before he have this writ. But now (adds this reverend writer "of the reign of Harry the 8th) they uſe to ſue forth ſuch writs "without any oath made; and the ſame is ill done, becauſe they "are oftentimes ſued out more for vexation than for any good "cauſe; and *the juſtices of the King's Bench will not grant any "writ for ſurety of peace, without making oath that he is in fear of "corporal damage.* And the juſtices of the peace ought not to "grant any warrant at the ſuit of any one to find ſureties of the "peace, if the party who does require the ſame will not *take "his oath that he requires the ſame* not for malice, but *for the "ſafety of his body.*"

It is moſt certain, alſo, that ſurety for the peace or the behaviour could be demanded in no caſe whatever, at common law, before conviction, that it ſprings wholly from ſtatute law within time of memory, and that the ſtatute authorizes it only in caſes of real perſonal danger; wherefore it may very well be doubted upon what legal bottom it can be extended farther. In the reign of Edward the 4th, it was determined, that it ought not to be granted to a man who ſhall demand it, becauſe he is in fear that another will take and impriſon him; by reaſon that he may have a writ de homine replegiando, or an action of falſe impriſonment, whereby he may be repaired in damages. This may be too ſtrict a conſtruction. But it is a proof that our anceſtors thought the ſtatute ought to be ſtrictly conſtrued, and that ſurety of the behaviour was only to be had as a protection from bodily maiming or deſtruction indicated and proved by threats of immediate injury, by the wear of dangerous and forbidden arms, or by wandering and lurking about highways, and other ſuſpicious places, in a ſuſpected manner. It has been reſolved, that this ſecurity cannot be demanded for fear of harm to ſervants,

vants, cattle, or goods; altho' a ſervant may demand it for himſelf in his own perſon like any other man; and it is never to be awarded by any magiſtrate but upon credible oath, or upon his own view, of a ſufficient cauſe. My Lord Coke ſays expreſly, that "ſlanderous words are not a breach of the be-"haviour, for tho' ſuch words are motives and *mediate* provo-"cations for breach of the peace, yet tend they not *imme-*"*diately* to a breach of the peace, like a challenge, &c." Many ſtrange diſcretionary deviations, however, from the words of the ſtatute, have been made and upheld with forced conſtructions by judges, in the flux of time; until, in the latter end of James the 1ſt's reign, it came to be aſſerted by Mr. Dalton, in his book, that ſurety for the behaviour could be demanded of libellers. I preſume, however, he muſt mean for ſuch a libel on ſome particular perſon as directly and immediately tends to provoke him to fight; for, I believe, it has been reſerved to our day, and to the compilement of crown law by Serjeant Hawkins, to have it maintained either in print or at the bar, that ſuch ſurety can be required for any public libel, or for a libel on any particular perſon not directly tending to an immediate breach of the peace. Be this as it may, the poſition is not warranted by any act of parliament, and is therefore abſolutely illegal.

It has been reſolved, "That ſedition cannot be committed by "words, but by public and violent action." And my Lord Coke himſelf (the introducter, foſterer, maturer and reporter of the preſent ſtar-chamber doctrine about libels) relates, "that in "the 30th of Q. Elizabeth, one *King* with ſureties was bound "by recognizance to appear at the *next* ſeſſions, and *in the mean* "*time* to be of the good behaviour. He appeared and was *in-*"*dicted* for ſlanderous words ſpoken," *ſince his binding*, to a ſquire, namely, *Thou art a pelter, a lyar, and has told my Lord ſlories*, and for *breaking and entering the ſquire's cloſe, and chaſing and vexing his cattle*, and for calling him afterwards *a drunken knave*. The indictment was removed afterwards into the King's-Bench, and there it was debated divers times both at the bar and the bench; whether admitting all that is contained in the indictment to be true, any thing therein was in judgment of law a breach of the ſaid recognizance. And it was reſolved, "neither any of the "words, nor the treſpaſs were any breach of the good behaviour, "for that none of them did tend immediately to the breach "of the peace; for tho' the words *liar and drunken knave* "are provocations, yet tend they not immediately to the "breach of the peace, as if *King* had challenged the ſquire "to fight with him, or had threatened to beat or wound "him, or the like, for theſe tend immediately to the breach

"of

" of the peace, to a treſpaſs on the perſon, and there-
" fore are breaches of the recognizance of the good be-
" haviour."

" Surety of the peace alſo (according to ſome great
" authorities) is not to be granted, but where there is a
" fear of ſome preſent, or future danger, and not merely
" for a treſpaſs or battery, or any breach of the peace
" that is *paſt*; for this ſort of ſurety is only for the ſecu-
" rity of ſuch as are *in fear*,"

Dr. *Burn*, after giving a ſuccinct and clear hiſtory of the ſeveral extenſions of the ſenſe of the ſtatute, caſe after caſe, and reign after reign, with ſtriking propriety remarks, that " one great inlet, to the larger and at length almoſt
" unlimited interpretation of the words, was an adjudica-
" tion in Henry the Seventh's time, That it was lawful
" to arreſt a man for the good behaviour, for haunting a
" ſuſpected bawdy-houſe, with women of *bad fame*;"
and concludes with the following judicious reflections:
" Thus the ſenſe of this ſtatute has been extended, not
" only to offences immediately relating to the peace, but
" to divers miſbehaviour not directly tending to a breach
" of the peace; inſomuch, as it is become difficult to
" define how far it ſhall extend, and where it ſhall ſtop.
" Therefore, the natural and received ſenſe of any ſtatute
" ought not to be departed from without extreme neceſ-
" ſity; for, one conceſſion will make way for another,
" and the latter will plead for the ſame right of admiſſion
" as the former."

Let the legiſlature interpoſe therefore, when they ſhall think fit, and ſee the public ſafety requires it; but, I hope, no crown Judge will ever preſume, for the future, to do more than *jus dicere*, and not *jus dare*. Every day makes one more ſenſible of the wiſdom of *Ariſtotle*'s counſel in making laws " *Quoad ejus* fieri poſſit, quamplurima *legibus*
" *ipſis* definiantur, quam pauciſſima *judicis arbitrio* relin-
" quantur." If Judges are not bound faſt with chains of *laws*, *cuſtoms*, *ordinances*, *and ſtatutes*, it is impoſſible to divine what a ſervile Chief Juſtice may not one day give out for law, to gratify the ſpleen of an anxious miniſter *.

* Whoever is inclined to enter fully into this important part of the law, *Surety for the Behaviour*, ſhould conſult Marrow, Crompton, Lambard's Eirenarchy, Pulton de Pace, Fitzherbert's and Burn's Juſtice, &c.

And ſuch a horror have I, particularly, of the introduction of any new *criminal* law into this country, that, were it to happen, rather than ſubmit thereto, I ſhould be even for accompanying a noble Law-lord to *Ultima Thule*, which, by the ſhiver he ſpoke of it with, I gueſs muſt be Scotland, the very northern ſcrag or bleakeſt barebone of the iſland. A man would fly any where in ſuch caſe.

When the Archbiſhop of Canterbury and ſix other Biſhops were called into the Council-chamber by James the 2d, and only preſſed to enter into a recognizance, "They ſaid, they were informed that no man was ob-"bliged to enter into recognizance, unleſs there were "ſpecial matter againſt him, and that there was oath of "it made againſt that perſon; and at laſt they inſiſted "there was no precedent that any member of the Houſe "of Peers ſhould be bound in recognizance *for miſde-*"*meanor*. The Lord Chancellor (Jeffreys) ſaid there "were precedents for it; but being deſired to name one, "he named none. Thereupon the Archbiſhop declared "he had the advice of the beſt council, and they had "warned him of this." Let me aſk then, whether the privilege of parliament is greater in one houſe than in the other?

It is further obſervable, that there is no adjudged caſe where this demand of ſurety for the peace in libel, has been determined to be legal; the crown hath in ſome caſes, as in that of Mr. Amherſt and others, after inſiſting upon it, avoided having the point determined, and relinquiſhed the claim to it, but not till the laſt minute: it is contrary to the general principles and notions of law; and it may be the means of great oppreſſion. Any gentleman would therefore ſerve his country, by reſiſting ſuch a lawleſs demand, and by having it ſolemnly argued, upon the firſt occaſion.

When a man is charged with a libel, by an arbitrary information *ex officio*, he muſt cry out, like a Roman of old, *Provoco ad Populum*; I appeal to my country, that is, to a Jury of my equals. I will give bail for my appearance to try the validity of this charge before them, but I will do nothing more. I never heard till very lately, that Attorney Generals, upon the caption of a man ſuppoſed a libeller,

libeller, could infiſt upon his giving ſecurities for his good behaviour. It is a doctrine injurious to the freedom of every ſubject; derogatory from the old conſtitution, and a violent attack, if not an abſolute breach, of the liberty of the preſs. It is not law, and I will not ſubmit to it.

What makes me inſiſt the more upon all theſe points is, an aſſurance that the legal methods of proceeding in every caſe of libel, are ſufficiently ſevere, and that therefore all illegality is totally inexcuſable. The proſecution is heavy, and if the ſuppoſed offender be found guilty by the Jury, his puniſhment may be extremely grievous. After the trial, all the circumſtances that appeared are reported, by the Judge who preſided, to the *King's Bench*; and this Court gives judgment thereupon, after deliberation, and both can and will proportion the puniſhment to the caſe. They may, *after* conviction, pillory, fine, impriſon, and even inſiſt upon ſureties for the good behaviour, according to the nature and degree, the miſchievouſneſs and tendency of the libel. In bad times, Sir Samuel Bernardiſton, for letters not very extraordinary, was fined 10,000 l. In good times, Shebeare, for the moſt ſeditious and treaſonable libel that could be penned, was fined in no very great ſum on account of his circumſtances, but was pilloried, committed to priſon for two years, and obliged to find ſecurity for his behaviour, in a pretty tolerable ſum himſelf and two ſureties in as much more, for ſeven years to come. This may be done in the regular way of proceeding, and ſeems to be as much power of puniſhment as can be wanted, for a mere miſdemeanor; becauſe I preſume nobody chuſes to revert to the additional puniſhments inflicted before the ſtar-chamber was ſuppreſſed; ſuch as public whippings, burning in the face, ſlitting the tongue and noſtrils, cutting off the noſe and ears, and long or perpetual impriſonment; which was the treatment of writers againſt Adminiſtration in thoſe days, and was abſolutely inflicted at one time upon the three liberal profeſſions, in the perſons of a clergyman, a counſellor, and a phyſician.

If the libel be upon the Legiſlature, and the Libeller a Member, the Houſe will expel him, as Queen Anne's Tories did Sir Richard Steele, for charging the Queen,

and her Miniſtry, with a deſign of breaking the eſtabliſhment and introducing the Pretender; and, yet, I ſuppoſe, now a-days there is nobody who doubts in the leaſt that Knight's having publiſhed the truth when he ſaid ſo. Indeed, he admitted himſelf the Author of the paper complained of, ſo that the then Commons were not obliged to help that neceſſary fact out, by the reception of teſtimony not upon oath. Nay, the Courtiers of that day thought the puniſhment of expulſion alone ſo ſevere (although Sir Richard's creditors were not more numerous than Mr. Wilkes's) that they ſtopped there, and carried on no proſecution againſt him in Weſtminſter Hall, or *any where elſe*.

I do not touch again upon Mr. Wilkes in this place as commiſerating him particularly, having ever avoided his acquaintance, but merely to ſay, what indeed the Hiſtory of England from the beginning of the reign of Charles the Firſt to the preſent time may illuſtrate, that proſecutions for libels generally ariſe from, and are purſued with a ſpirit of party-revenge. Men are upon ſuch occaſions apt to do things which in cooler moments they would be aſhamed of. With reſpect to the laſt named Libeller, I muſt however declare, had I been his conſtant comrade, and my doors open to him at all hours, much more the partaker of his looſeſt pleaſures, and of his moſt ſhameful blaſphemies, I ſhould not have ſtood forth, either in the one Houſe or the other, as the immediate mover of *the poor devil's* public diſgrace, cenſure, proſecution and ruin, or as the mercenary advocate of his purſuers; unleſs I had an inclination to convince mankind, that I was regardleſs of all principle whatever, excepting that of ſerving a party for my own private intereſt, and from that motive was willing to act upon any ſtage, the moſt inconſiſtent and moſt abandoned of all parts, even againſt the companions of my happieſt moments; and to imprint this leſſon upon the world, that no motive whatever of public good or private friendſhip was at the bottom of my conduct, or even the ſmaller reſtraint of common decorum. Real good-nature, friendlineſs, charity, (whatever you call it) will cover a multitude of ſins, but mere companionable eaſe or mirth, with an unfeeling heart, only enhances the profligacy of a character. If debauches will not ſink below the worſt of gangs,

gangs, they ſhould at leaſt be true to each other, as kindred ſouls. In my own opinion, this ludicrous Libeller did himſelf all that his ſevereſt enemies could wiſh, to turn his own caſe into ridicule, and to let the people ſee that a love of farce and merriment predominated in all his actions; and that he had too much levity and viciouſneſs of natural conſtitution, to make the good of his country the rule of his conduct in any one action of his life. But the ſight of thoſe very things ſhould make grave men of all ſides attend to the conſtitution in ſuch conteſts of profligacy, to prevent the laws of their country from being made either the ſport or the ſacrifice of party upon the occaſion. A point that is carried for the ſake of puniſhing a worthleſs fellow, may be cited hereafter as a precedent for the moſt dangerous proſecution and oppreſſion of an excellent patriot.

The moſt reſpectful and conſtitutional of remonſtrances from ſeven biſhops, in behalf of the eſtabliſhed religion, has been treated as a ſeditious libel, and nothing but the honeſty of a Jury ſaved them from the moſt unjuſt condemnation. "The Attorney and Solicitor both affirmed "to James the 2d, That the honeſteſt paper relating to "matters of civil government might be a ſeditious libel, "when preſented by perſons who had nothing to do with "ſuch matters, as (they ſaid) the Biſhops had not but in "time of parliament *."

Mr. Somers's *modeſt plea for the Church of England*, underwent the ſame denomination, although it was no more than a ſeaſonable defence of our national worſhip, upon the true principles of the conſtitution, againſt an arbitrary and Popiſh Court.

And I remember myſelf a tiny pamphlet, publiſhed by the Author of *The Conſiderations on the German war*, queſtioning the merits of the defence of Minorca, by argument, not by hard words or foul names, which was unfortunately on motion in the *King's Bench* deemed a libel, and an information in the ordinary way granted againſt the writer, whereby he became a conſiderable ſufferer; and yet I believe any man who were to read this performance now, free from prejudice, would never concur in that opinion.

* See Lord Clarendon's State Letters, p. 317.

In

In ſhort, one cannot gueſs what may, or may not, in ſome unlucky time, be regarded as a libel by ſome Judge or Attorney-general. The higheſt or loweſt of Authors, the nobleſt or the moſt ſneaking, the Original or the Copy, the Patriot or the Tool, the Head of a Party, or the Amanuenſis of a private Junto; in ſhort, the moſt reſpectable Commonwealthſman or the paltrieſt of Coffee-houſe Liſteners and Political Eaveſdroppers, may equally chance to fall under this arbitrary brand.

Nay, if two foreigners here ſhould happen to have a diſpute relative to their reſpective characters or appointments, and a difference ſhould ariſe about the œconony or charges of one ſide and the other, and either ſhould publiſh, by way of juſtification of his pretenſions, letters that really paſſed, they might, for aught I know, be held a libel, for which the Attorney-general might file an information, and whereto no defence, by the help of a little management, ſhould be deemed poſſible, and which counſel might fairly give up without the loſs of their character.

If a man was now to publiſh an ode, like that of Mr. Pulteney to Lord Level.

" Let's out for England's glory,"

inviting any courtier to join in meaſures of oppoſition to the adminiſtration, and it was to be written with half the ſpirit and beauty, it might be the object of an information *ex officio*, as a libel, altho' no man turned of thirty, I ſuppoſe, would think any placeman could be moved thereby to oppoſe the court, and quit a part of their finery for the ſake of being a patriot.

Nay, if it be law, that a man may be guilty of a libel by writing againſt the dead (as well as the living) I do not ſee how the world is ever to diſcuſs the actions of adminiſtration, or any man to publiſh animadverſions upon their conduct in particular inſtances; nor what is to become of the licenſed hiſtorian, with his rule of *Nequid veri dicere non audeat*. For example, if I was to ſay of a late Great Chancellor, that I could not think he merited the appellation of a patriot, having ever regarded him as a decent, circumſpect, prerogative lawyer; that he leaned in his notions too much towards ariſtocracy; that he ſeemed, in his politics, to approach much nearer to the principles of the Earl of Clarendon (whoſe title he once affected) than

than of Lord Somers; and that, at laſt, upon what *public* principles he joined the oppoſition, after having been in all things with the court for forty years before, I could never learn. It ſeemed, that even his oppoſition to or rather diſapprobation of, the peace, proceeded rather from a private diſſatisfaction at the man who happened at laſt to have the making of it, (his old friends being diſplaced) than from any motive of public concern; and ſome of his reaſons againſt it, indifferent men thought the ſtrongeſt in its behalf, namely, the delineation of our boundary in North America, which, altho' the courſe of a great river is made to deſcribe, he objected to, becauſe its extremely diſtant *ſource* could neither be aſcertained or denominated. His diſcourſe, it was remarked, favoured more of a draughtſman arguing exceptions, than of a ſtateſman diſcuſſing a treaty. And nothing perhaps like it can be recollected, ſaving one equivocal ſpeech of a ſimilar texture, delivered in another place, but at the ſame time and upon the ſame occaſion; where the arguments were ſo artificial, qualified and verbal, without edge or ſubſtance, that it would be extremely difficult to put into clear and diſtinct propoſitions, what was either affirmed or denied, touching any of the articles themſelves. Indeed, I could never determine whether he had, or had not, a good conception of our foreign intereſts, altho' I am perſuaded he had a thorough one of all the domeſtic connections among us. I might add, that when a bill for a militia was preſented, altho' he liked the name and ſpeciouſly commended the deſign, yet he foreſaw great difficulties and infinite danger in it, recalled to mens minds the public evils that followed from arms being put into the hands of the people, no leſs than the deſtruction of royalty and the ſuppreſſion of peerage; and ſo found innumerable objections, both religious and political, to the form and the ſubſtance of the ſeveral clauſes, and to all the regulations propoſed. The tide, however running for the meaſure, both as a national ſtrength and a counterpoiſe to a ſtanding army, he ſuggeſted ſeveral enervating amendments, to reduce the number propoſed one half, and to have the other either officered wholly by the crown, or elſe unofficered at all, as a mere fund in the hands of the King, for the better ſupply of his ſtanding army. The

number

number was accordingly curtailed, and other qualifications took place. But, at laſt, when the bill became an act, things were ſo managed in his particular county, that the militia was never either embodied, or commuted for in money, in ſpite of the alternative laws for the purpoſe. He was apparently a principal man in, if not the ſole cauſe of, defeating a new Habeas Corpus bill, paſſed unanimouſly by the Commons, and calculated for the prevention of ſome evaſions of the old act: and projected, in concert with another new made peer, the marriage act, and, having diſapproved a ſhort bill drawn by the Judges, obliging people to marry in churches, that their marriages might be regularly regiſtered and capable of proof; had the reputation of drawing another, filled with clauſes calculated for the prevention of all marriages without conſent, with a view, as it ſhould ſeem, to perpetuate, as much as might be, a fortune or family once made, by continuing from generation to generation, a vaſt power of property, and to facilitate at each deſcent, the lumping of one great ſum, or one great family, to another, by bargain and ſale, in oppoſition to the generous principles of equality and diffuſive property, which free ſtates have always encouraged. The royal family, however, was excepted out of this late act, altho' their marriages are alone an object of public concern or influence. I might aſk too, whether his Lordſhip did not uniformly throughout his life, purſue his own private intereſt, and raiſe the greateſt fortune and provide the moſt amply for his family, of any lawyer that ever lived; and whether, during his dominion, the judicial promotions were diſpoſed of upon miniſterial motives, or merely agreeable to profeſſional deſert. I might nevertheleſs, and ought to add, that the fame illuſtrious perſonage was bleſſed with a good temper, and great worldly prudence, which are the two hand-maids in ordinary to proſperity; that his whole deportment was amiable; and that he poſſeſſed, in general, the ſoundeſt underſtanding in matters of law and equity, and the beſt talents for judicature I had ever ſeen, that he might be cited as an example, in this country, of the perfect picture of a good Judge, which my Lord Bacon had ſo admirably drawn; and that he was, in ſhort, a truly wiſe magiſtrate. He was free from the levities,

vices,

vices, and expences, which are ſo commonly the product of a lively and purient fancy. His ſtation did not require nor his genius furniſh him with imagination, wit, or eloquence. And, perhaps, had he poſſeſſed a true taſte for the fine arts and the politer parts of literature, he would never have been ſo extenſive a lawyer, to which however, the plainneſs of his education might have ſomewhat contributed. In ſhort, one might ſay that Lord Somers and He ſeem to have been the reverſe of each other in every reſpect.

Now, this might be proſecuted as a libel on the dead; whereas, the writer penned no part of it maliciouſly, nor falſely, as he believed, and did not mention a tenth part of what he might, in ſupport of the juſtneſs of the character. And therefore, unleſs a matter be thoroughly canvaſſed, and gentlemen at the bar will ſpeak out to a Jury, that they may have the proper information to deliberate upon, it is hard to ſay what may not very glibly paſs at one time or other for a libel. Every thing depends upon the Jury's judging for themſelves.

If they once give up this right, we ſhall never know any thing of public tranſactions, but from the moſt partial and leaſt credited of all mankind, from writers employed by the authors of the meaſures themſelves, who, like Scotch Reviewers, may have the face to attempt to make Engliſhmen believe, that a man can be a conſtitutional judge, who quits the laws of the land and deviates from the eſtabliſhed practice of courts, in ſpight of common ſenſe and the conſtant declaration of our anceſtors, *nolumus leges Angliæ mutari*. Let the dependent judges before the Revolution have advanced what doctrine they pleaſe, the *fact* has been, that juries have always exerciſed the right of determining what is a libel. It hath ſaved this conſtitution often, is the great bulwark of liberty, and ſhould never be reſigned, but with the laſt breath.

Few men know much of the nature of polity, and, of them, all do not ſufficiently attend to the conduct of Adminiſtration, to obſerve when ſlight innovations are made in the laws or in their Adminiſtration; and, of thoſe who do, very few indeed have that degree of underſtanding which enables them to judge ſoundly of the conſe-

quences

quences of such alterations, with respect to their liberties in general. Again; of these very few, not more than one perhaps, has activity, resolution, and public spirit enough to publish his thoughts (as Mr. Somers did upon several occasions) concerning what is going forward, in order to alarm (like a good citizen) the rest of his fellow subjects. Insomuch, that breaches in the constitution, which by degrees bring on a total loss of liberty, are either wholly unnoticed, or else are regarded as the mere violences of party, by which nobody can be affected but the immediate actors. Whereas, for the sake of compassing their own ends, there is nothing which party-men will not do, *per fas aut nefas*; just as an established high-churchman will persecute even to death, any other man or divine that questions his authority or his doctrine. From hence arise precedents of all sorts of illegal and unconstitutional practices. Ministers (as not one in a thousand is actuated by any principle of public good, or even by a desire of honest fame) for the sake of power, title, riches, and pre-eminence of any kind, will deceive the best inclined Prince, and minister to the humour, folly, vices, and domination of the worst. On the Exclusion-bill, no more than two, even of the Bishops, would venture to vote for it, altho' their Bishopricks depended upon the continuance of the Protestant religion, which that bill was avowedly framed to preserve. Now, when an impartial man gathers this, both from his own experience and from history, how can he help being moved at the doctrine that is publickly held with respect to writings that animadvert upon public proceedings, and the use that is made of that desperate sword, an information, together with the means which are every day devised to make it more dreadful?

I will venture to prophecy, that if the reigning notions concerning libels be pushed a little farther, no man will dare to open his mouth, much less to use his pen, against the worst Administration that can take place, however, much it behoves the people to be apprized of the condition they are likely to be in. In short, I do not see what can be the issue of such law, but an universal acquiescence to any men or any measures, that is, a downright passive obedience.

There

There is one great reaſon, why every patriot ſhould wiſh this ſort of writings to be encouraged; which is, that animadverſions upon the conduct of miniſters, ſubmitted to the eye of the public in print, muſt in the nature of the thing be a great check upon their bad actions, and, at the ſame time, an incentive to their doing of what is praiſeworthy. Nevertheleſs, if it be once clear law, That a paper may be a libel, whether true or falſe, written againſt a good or bad man, when alive or dead, who is there that may not continue a Miniſter, whether he has a grain of honeſty or underſtanding, if he ſhould happen to be a Favourite at Court? The worſe his actions are, the more truly and ſharp the writer ſtates them; and the more the public, from his juſt reaſonings, deteſt and cry out againſt them, the more ſcandalous and ſeditious of courſe, will be the libel; for, *the truth of the fact is an aggravation* of the libel; and it was That which occaſioned the clamour. There is but one ſtep farther before you arrive at complete deſpotiſm, and that is to extend the ſame doctrine to words ſpoken, and this I am perſuaded would in truth very ſoon follow. And then what a bleſſed condition ſhould we all be in! when neither the liberty of free writing or free ſpeech, about every body's concern, about the management of public money, public law and public affairs, was permitted; and every body was afraid to utter what every body however could not help thinking!

With reſpect to libels on a particular perſon, in his private capacity, there may be ſome foundation for a doctrine of this ſort; becauſe, as the welfare of the State has nothing to do with his private tranſactions, you ought not to make reflections which may injure him in his calling or his reputation; you muſt always do this out of perſonal ſpite, and therefore ought to be puniſhed for ſuch your malevolence.

But, the caſe is totally different with reſpect to an Adminiſtration; for the country in general is always the better or the worſe for its conduct, and therefore every man has a right to know, to conſider, and to reflect upon It. Their poſts in the State, or their public characters, are not like any individual's particular trade, profeſſion or fortune, or his private character. The writing of them out

of their places in the Government is not a loſs for which they have any right to be repaired in damages. Their holding ought only to be *quam diu bene ſe geſſerint*, and of this the people at large ought to be made judges, as every man in this country is repreſented, and conſequently concerned in the legiſlature itſelf

However, from a confuſion of theſe two different kinds of libels, introduced and upheld from very bad motives, it ſeems to me that a general doctrine has been laid down. Now, my notion is, that in public libels the truth of the charge ſhould be an abſolute defence, whatever may be thought neceſſary with regard to private libels. The public is eſſentially intereſted in this diſcrimination being made.

When men find themſelves aggrieved by the violence or the miſconduct of the perſons appointed to the Miniſtry, it is natural for them to complain, to communicate their thoughts to others, to put their neighbours on their guard, and to remonſtrate in print againſt the public proceedings. They have a right ſo to do, as much as a borough has a right to reject any Court candidate, and to publiſh the reaſons for ſo doing; and both of theſe rights will I hope be exerciſed until there can be both a congé de dire and d'ecrire, and a congé d'elire, eſtabliſhed in the State as there already is in the church. The liberty of expoſing and oppoſing a bad Adminiſtration by the pen, is among the neceſſary privileges of a free people, and is perhaps the greateſt benefit that can be derived from the liberty of the preſs. But Miniſters, who by their miſdeeds provoke the people to cry out and complain, are very apt to make that very complaint the foundation of a new oppreſſion, by proſecuting the ſame as a libel on the State. Now, the merit or demerit of theſe publications muſt ariſe from their being true or falſe; if they are true, they are highly commendable; if they are wilfully falſe, they are certainly malicious, ſeditious and damnable. The mere pretence of a paper being ſeditious, if the matter of it be fact, is to be diſregarded; for I do not ſee how any writer can publiſh to the world the juſteſt and moſt important complaints, without tending thereby to render the people and their conſtituents diſſatisfied with the adminiſtration, and even clamorous againſt it. Nay, I ſcarcely can frame to myſelf any other way of letting his Majeſty know that the miniſtry he

has

has appointed is bad. However, if a minister notwithstanding should continue a favourite at Court, and the people being affected with what was written should clamor, and have great reason for so doing, I make no doubt but any Attorney-general, upon the slightest hint from the proper place, would file an information against the Writer, and charge him at once with endeavouring to alienate the affections of the people, and to raise *traitorous* insurrections against the peace of the King; altho' it were obvious to every indifferent person, that the unlucky writer had no such intention, nay, had been ready on a former occasion voluntarily to associate for the defence of his Majesty's title, and to venture his life in the field to support it. And yet I am fully convinced, that were it not for such writings as have been prosecuted by Attorney-generals for libels, we should never have had a Revolution, nor his present Majesty a regal Crown; nor should we now enjoy a protestant religion, or one jot of civil liberty. Kings can hardly receive any intelligence but what their ministers give them, and these gentlemen, being generally guided by avarice and ambition, endeavour to represent every man who strives to get them dismissed from their employs, as one who is about to attack the throne itself, call him traitor directly, and then exert the power of the crown to demolish him. The use of the word *treasonable* is generally, to give them a pretence for disregarding the common rules of Law and Justice. And if they are questioned in parliament for what they have done, they are in hopes a majority may be procured to come to a resolution in their favour, or at worst, to prevent any from being come to against them. And then, who dares say they have done amiss?

Libels are by no means a "harmless sport"; for truth alone can excuse any man in complaining even of a bad magistrate: but yet, I cannot think them such dreadful things as vindicate ministers in breaking through every law for the sake of coming at the writer. I believe most sober men, who see already what lengths such prosecutions may be carried according to law, and how deeply the liberties of the people may be affected by such means, are of opinion, that if some of the legal methods of prosecution now acquiesced in were done away, the constitution would be the better for it. The prerogative which an Attorney-general

neral assumes of filing an information against whomsoever he pleases, is certainly a reproach to a free people; and if the regular information awarded upon special motion by the *King's-Bench* were likewise taken away, I do not think the constitution would be injured by it: in which case, the old common law method of indicting for a libel, as a violation of the peace, would be the means that every body must resort to; and in my own opinion a grand jury * are very competent and the propereſt judges, whether any publication be destructive to the welfare of the state or not.

Altho' there is as yet no licensing act afoot, except for the Stage; if a man prints what is supposed libellous, either on the state, or any particular person, he is liable to be prosecuted for it. But people like to see a prosecution go forward in the ordinary way, as was the case with Dr. Shebeare: in comparison with whose writings, those of Mr. Wilkes may really be said to be "a mere exercise of wit and talents, and an innocent exertion of the liberty of the press." Mankind will ever dislike violent proceedings. Altho' the person himself may merit the chastisement he meets with, yet if this be inflicted by illegal methods, it will make every man fear, should he raise the resentment of the ministry, that himself would be treated in like manner, whether he had committed any crime in law or not. If things are done in one instance contrary to law, they may in another. No man is secure, when the laws of the land cease to be a protection. Although the messenger, or the dragoon, be not at my door, yet it is very disheartening to find that it is no longer in my power to be secure against their being there. My liberty is equally gone.

No necessities of state can ever be a reason for quitting the road of law in the pursuit of a libeller. The attack of this class of writers seldom goes farther than the minister, for the sake of bringing in some other man; and so far from being "of all other the instance the most dangerous to the public quiet", is certainly not at all so, if by the public quiet be meant the establishment itself.

Whether the warrant of Lord H. was only for a seditious or for a seditious and treasonable libel, makes no difference.

* See a valuable tract upon Grand Juries called *The Security of Englishmen's Lives*, attributed to Mr. Somers, who not only understood the constitution but loved it.

The

The fact indeed is, that the * warrant, which was for apprehending perſons and papers, does not mention the word libel at all, but uſes the terms, *a ſeditious and treaſonable paper*; and the ſecond * * warrant, which was for committing Mr. Wilkes to the Tower, makes uſe of the terms, *a moſt infamous and ſeditious libel.* So that there is a diverſity of denomination and deſcription obſerved by the drawer of the warrant, whether, the ſame were the Secretary of State, his law clerk, or the ſolicitor to the treaſury. Then comes the Attorney General, who files his information *ex officio* againſt the writer, and *charges* him with writing a libel. Now, *he* certainly knows what he

* George Montague Dunk Earl of Hallifax, Viſcount Sunbury and Baron Hallifax, one of the Lords of his Majeſty's moſt honourable Privy Council, *Lieutenant General of his Majeſty's forces*, and principal Secretary of State.

Theſe are in his Majeſty's Name to authorize and require you (taking a conſtable to your aſſiſtance) to make ſtrict and diligent ſearch for the authors, printers and publiſhers of a ſeditious and treaſonable paper intitled the North Briton Numb. 45. Saturday April 22, 1763, printed for G. Kearſly in Ludgate-ſtreet, London, and them, or any of them, having found, to apprehend or ſeize together with their papers, and to bring in ſafe cuſtody before me, to be examined concerning the premiſſes and further dealt with according to law. And in the due execution thereof, all Mayors, Sheriffs, Juſtices of the Peace, Conſtables and all other his Majeſty's Officers civil and *military*, and loving ſubjects whom it may concern are to be aiding and aſſiſting to you, as there ſhall be occaſion, and for ſo doing this ſhall be your warrant. Given at St. James's the 26th day of April, in the 3d year of his Majeſty's reign.

Dunk Halifax.

To Nathan Carrington, John Money, James Watſon, and Robert Blackmore.

* * Charles Earl of Egremont, and George Dunk, Earl of Halifax, Lords of his Majeſty's moſt Honourable Privy Council, and principal Secretaries of State.

Theſe are in his Majeſty's name to authorize and require you to receive into your cuſtody the body of John Wilkes, Eſq. herewith ſent you for being the author and publiſher of a moſt infamous and ſeditious libel, intitled, the North Briton, Number 45; tending to inflame the minds and alienate the affections of the

he is about, whether the others did or not; and therefore there is no longer any room to diſpute about the crime, it is aſcertained. Indeed, the King's meſſage † to the Houſe, delivered by the *Chancellor of the Exchequer*, touching the ſame paper, calls it no more than a moſt ſeditious and dangerous libel, and the Reſolution of the Commons execrates it but a falſe, ſcandalous and ſeditious libel.

But a deciſive argument upon this head is, that had the charge been other than a miſdemeanor, it could not have been proſecuted in this way; for, no *information* will lie for a capital crime, or for miſpriſion of treaſon. The ſtatute ſays, it ſhall not lie for life or limb.

It is childiſh therefore to aſk, whether the printing of any particular libel, as for inſtance, of the North Briton No. 45, "is to be conſidered as no higher an offence than "publiſhing a libel?" The Attorney ſays, "had it been "adjudged to have excited, inſtead of tending to excite, "it would have been no leſs a crime againſt the State, "than that of high treaſon, without any palliation what-"ever:" to which I can only ſay in a plain way, that had it been adjudged to have been ſomething elſe than a libel, it would not have been adjudged what it was; for, I do not know that any law-logic ever proved *libel* and *high treaſon*, to be convertible terms. No two offences can be more diſtinct in their nature or kind. One is *by conſtruction*, a breach of the peace, and the other is the higheſt of all capital crimes, by expreſs ſtatute.

To compaſs or to imagine (that is to excite to, or intend) the death of the King is High Treaſon, and is

the people from his Majeſty, and to excite them to traitorous inſurrections againſt the government. And to keep him ſafe and *cloſe*, until he ſhall be delivered by due courſe of law; for ſo doing this ſhall be your warrant. Given at St. James's the 30th day of April, 1763, in the 3d year of his Majeſty's reign.

Egremont.
Dunk Halifax.

To the Right Honourable Lord
John Berkeley of Stratton,
Conſtable of his Majeſty's
Tower of London, or to the
Lieutenant of the ſaid Tower
or his Deputy.

† Vide the Printed Votes of Tueſday, November 15, 1763.

puniſhed

niſhed with loſs of life, by hanging, drawing and quartering, whether the King be killed, or even hurt or not. But this doctrine holds in no other crime whatever. For, in petty treaſon, which is the next greateſt crime that the law knows, and which is the murder of a huſband by the wife, or of the maſter by the ſervant, the inciting of others to perpetrate the fact, or any Attempt to do it oneſelf, without effect, is only puniſhable as a miſdemeanor and as an aſſault. Let us not then be ſo impudently impoſed upon as to be told, that every ſtep we take in queſtioning the acts of a miniſter, is high treaſon. Every London or Weſtminſter mob, every riot, every abuſe of adminiſtration or of a party; every remark or animadverſion upon a proclamation, or upon a ſpeech from the throne, or, in ſhort, upon any other public meaſure of the miniſtry, will in this way of reaſoning ſoon be deemed Treaſon, to the diſgrace of ourſelves, the diſhonour of our conſtitution, and the loſs of the rights of a free people.

In truth, I likewiſe ſuppoſe the Attorney General knows his buſineſs too well to denominate any offence a libel, and to proſecute it by information only, if he means to have it conſidered as high treaſon.

Indeed, I have heard in diſcourſe, that a certain laborious miniſter has whiſpered many of his friends, " whatever they " might hear from others, that the law-officers of the crown " had aſſured him, Mr. Wilkes might have been proſecuted " for high treaſon; but however, they were not willing " to puſh things againſt him to the utmoſt." An aſſertion that is ſcarcely to be parallelled (I believe) for its folly, profligacy or effrontery; and which, in a country where nothing can be done but by law, deſerves no other anſwer than this, " I wiſh you had attempted it, for if you had, " it would have ruined you, and you would have deſerved " it, as the only adequate reward for your pains." The Epping-foreſt caſe would not warrant this poſition, I can aſſure him; and I am certain he has a private friend, a candid lawyer, who would ſtrongly diſſuade him from really making ſo ridiculous an attempt. I ſay this, becauſe I ſuppoſe the miniſter himſelf, is now become ſo Right Honourable, that he ceaſes any longer to be learned in the laws of his country.

" The earl of Briſtol, having exhibited a charge of Trea- " ſon againſt the E. of Clarendon, alleged, That he had " endeavoured to alienate the affections of his Majeſty's

" ſubjects, by venting *opprobrious ſcandals* againſt his Ma-
" jeſty's *perſon*, and that he had traduced *both houſes of*
" *parliament*. The Judges were ordered to give their
" opinion whether this be any treaſon or no? They una-
" nimouſly agreed, That if the matters alledged in the
" charge were admitted to be true, altho' alledged to be
" *traiterouſly done*, yet there is no Treaſon in it."

Why then, is the Attorney angry with any other man for talking of No. 45, as a libel? He himſelf, with all his elaborate perplexity of language, can tell no more? Why need he ſearch for words to denominate " ſeditious " writings, a ſubtile poiſon, the ſeed of jealouſy, revolt " and diſcord, the parent at leaſt if not the offspring, " of treaſon?" (Or why not both parent and offspring at one and the ſame time: the ſenſe will not be hurt, and the creed be more orthodox?) In every light he can put theſe writings, they will appear the ſame, their nature will not alter, they will ſtill be but libels.

Indeed there is a great deal of difference between libel and libel, as between other individuals of one and the ſame ſpecies, ſome having more and others leſs wit, ſome being more and others leſs perſonal, ſome levied againſt the eſtabliſhment, and others againſt that varying thing a miniſtry. For example, *The Sixth Letter to the People of England* was a moſt groſs attack upon the preſent conſtitution and ſucceſſion; but *The Teſt*, *The Letter verſified*, and *Rodondo*, were merely perſonal abuſe upon Mr. Pitt, his Lady, and her eldeſt brother. *Mock-Patriotiſm* took a middle flight between the abuſe of one or two individuals, and that of a whole party; altho' for the beauty of its images, the happineſs of its alluſions, and the elegance of its expreſſions, it was *rara avis* in this predicament of writers: none of whom however were without ſome wit and merit; excepting always the dull and rancorous Jacobite firſt named. In truth, abuſive ſatire has been dealt in pretty equally of all ſides, and the only meaſure has been the abilities of the reſpective penmen. When ſomebody ſhewed a North Briton to old Johnſon, turning his definition of a penſioner upon himſelf, he very cleverly anſwered, " It " is fair enough, I have no reaſon to complain,

" *Nec lex juſtior ulla*
" *Quam necis artifices arte perire ſua.*"

After all, the Attorney himſelf cannot help ſpeaking of the compoſition of libels as an exerciſe of wit, and there-

upon

upon " ſuppoſing the author of *The Budget* may chuſe by and " bye to *amuſe* himſelf this very way;" and then roundly charges this gentleman " with perſonal indecency, and his" ſuppoſed " friend with acrimony, envy, ſpleen, conceited- " neſs and ſelf-importance" as mere flowers, I preſume, of rhetorick, well becoming the pen of a miniſterial writer againſt libels. And, he ſpeaks of the ruin of a virtuous patriot by an information, with as much glee, as an old letcher does of the debauching of a comely virgin by raviſhment.

Nobody without doors thinks the caſe of any " libel juſtifies ſtrongly," or at all, " the practice of general warrants," if it were only for this reaſon, that every party againſt whom a libel is levelled, always chriſtens it ſeditious, treaſonable, and what not; and yet, whether it be any libel at all, no man has a right to pronounce, before a Jury of the country has determined it to be one. They are likewiſe leſs neceſſary in this than any other offence, becauſe the publiſher muſt always be known and may be come at, whether the author be ſo or not. And " it would be (as *Hawkins* ſays) " extremely hard, to leave it to the diſcretion of a common " officer to arreſt what perſons, and ſearch what houſes he " thinks fit: and if a Juſtice cannot legally grant a blank " warrant for the arreſt of a ſingle perſon, leaving it to the " party to fill it up, ſurely he cannot grant ſuch a general " warrant, which might have the effect of an hundred " blank warrants."

With reſpect to the warrant of Lord H. if the form had really been according to the " uninterrupted practice of the " ſecretary of State's office," this would not have made it legal. But even this is not a fact; for one cannot help remarking, that the old Tories under Queen Anne, the Revolution ſtill tingling in their ears, were exceedingly cautious, conſulting council, probably upon the warrant itſelf, before they ventured to take up a ſubject; inſomuch, that all the warran s even of Lord Bolingbroke, whilſt he was Secretary of State, appear to be ſtrictly legal. In truth, there has been no uniform practice in the office, as may be ſeen by the variant and multiform warrants printed from thence in *Quarto*, and privately diſtributed to truſty friends by P. C. W. with the inſcription of *moſt ſecret*. Much leſs would precedents only from the time of the Revolution be ſufficient to *juſtify* ſuch an illegal practice. And as to the pretence that this practice " did not then take its riſe, " having been frequent in former reigns, reaching back " *perhaps* to the remoteſt times, and combined with the ve- " ry eſſence of government," it is totally groundleſs; for,

after the moſt diligent ſearch, no warrants of a ſimilar form could be found higher than the reign of the Stuarts, but few of them, and of thoſe few hardly more than one of an antienter date than Bennet Lord Arlington, Secretary to Charles the 2d. From ſuch premiſes, however, this hardened writer would inſinuate, that perhaps they were uſed in the remoteſt times, and are of the eſſence of government. This notable antiquity of office is indeed further ſupported by a note, which takes notice that the act of Henry the 8th, ſettling precedency, mentions, among other officers, the King's Secretary. It does ſo. And what of that? This was the æra of the reformation of Religion; but, I never heard before it was the commencement of civil government. No prior mention, however, of King's Secretaries, as officers of State, could, I ſuppoſe be found, and therefore this or none muſt be cited. Is this now, in the name of common ſenſe, a proof of immemorial exiſtence? The fact is, in antient times, the King had only a private Secretary for his Privy Council; there was no ſuch perſon as a Secretary of State. He is the production of times within memory (to ſpeak as a lawyer;) and none of the many books which treat of the great officers of State, and the *Aula Regis*, make any mention of ſuch a Being. The 2d of Richard II. which gives the action of *Scandalum magnatum*, in the enumeration of great officers of State, does not notice either the King's Secretary or the members of his Privy Council. There is no mention made of the Secretary by *Forteſque*, Lord Chancellor to Henry the 6th, in a book on *abſolute and limited Government*, which he wrote under the reign of Edward the 4th, where he conſiders the King's Council and the great officers about the throne. In truth, the Secretary's conſequence and power aroſe from his being admitted a member of the Privy Council, and as ſuch alone it is that he can pretend to the power of commitment; and yet, as I take it, altho' the Privy Council, as a Board, have conſtantly exerciſed this power, no ſingle Privy Counſellor, nor any member of Privy Counſellors not met in Council as a Board, can pretend to ſuch a Power. Be this as it may, and let the Secretary of State be allowed the power which he has long exerciſed of committing, and which has been in ſome meaſure recognized by courts of juſtice; as being ſuppoſed to act immediately *per mandatum Regis*, and to be the chief inſtrument of his moſt ſecret commands, and the moſt confidential of his Privy Council: yet, the being a Privy Counſellor or Secretary of State, does not make a man a Juſtice of Peace,

Peace, and more authority or jurisdiction no Secretary ever claimed. To render him so, it has of late been always the practice to insert by name every Privy Counsellor into the commissions of the peace, that from time to time pass for the several counties. So that the two grounds suggested as an authority for the issuing of these General Warrants, namely, the constant exercise and usage of them, and the antiquity of the Secretary of State as a Privy Counsellor, both fail. But, had they both been good, they would not have authorized these warrants; because, a practice of the like sort, must be supported by uniform usage; and the warrants produced, differed so much in their form, that hardly any three of them were exactly alike. The greatest part too of the warrants offered in proof of this custom and pretended right, were issued in the times of rebellion; when men are not likely to call in question such a proceeding, the extremity of the case making them wink at all irregularities, for the sake of supporting the protestant establishment itself. And yet, bad men, as one may easily figure to one's self, will be apt to lay stress upon such acts of necessity, as precedents for their doing the like in ordinary cases, and to gratify personal pique, and therefore such excesses of power are dangerous in example, and should never be excused, but when it appears that government could not be defended or upheld without actual recourse to them. But, even if the usage had been both immemorial and uniform, and ten thousand similar warrants could have been produced, it would not have been sufficient; because, the practice must likewise be agreeable to the principles of law, in order to be good, whereas, this is a practice inconsistent with, and in direct opposition to, the first and clearest principles of law. Immemorial uniform usage will not even support the bye-law of a corporation, if it be flatly repugnant to the fundamentals of the common law; much less, will it authorise the secret practice of a political office. In one word, no warrant whatever, in any case or crime whatever, that names or describes nobody in certain is good, or can be justified in law, in any circumstances whatever. Therefore, if that point alone had been put in question, I do not see how any "thinking "and honest man could have fairly voted against it." The law is too well established to be rendered doubtful, by all the dexterity of the Attorney or his Coadjutor.

Eight

Eight years of ingenious judicature will ſcarcely accompliſh ſo arduous a taſk.

The Attorney might as well ſay, that Lord H. when uſing the power of a Juſtice of the Peace by virtue of his office of Secretary of State, could make an illegal warrant as a Magiſtrate, good as a military officer, by ſtyling himſelf *Lieutenant General of his Majeſty's Forces*, and commanding all *military officers to aſſiſt as there ſhall be occaſion*. The circumſtance, tho' new, I am ſeriouſly of opinion, is as good an argument in law, as what can be derived from the uſage of a Secretary of State's office.

Moreover, it is not true, even in a political ſenſe, that a declaration of the illegality of all General Warrants whatever would "take away from the executive power, an "authority which may be frequently found eſſential to "the very being of the State." For, if in caſe of High Treaſon (the only crime that need ever occaſion a ſtretch of authority, and even That very rarely) there ſhould be a neceſſity for the apprehenſion of people, whoſe names, or any certain deſignation of their perſons, could not be had, and this was made afterwards to appear; as That is a crime which tends to the diſſolution of the whole frame of government, there is no doubt but the miniſter would be excuſed for the dictatorial power he ſhould exerciſe, *pro ſalute Reipublicæ*, upon ſuch an emergency. But I would have ſuch things as emergent neceſſities applied to his pardon, and not to his juſtification.

Therefore, I ſee no reaſon why a man ſhould not vote for the condemnation of General Warrants in all caſes, without limiting his damnation to General Warrants in the caſe of ſeditious libels. "The propoſitions are different," but in the eye of the law, theſe General Warrants are in both caſes equally illegal. In ſhort, if this was not the conſtitution, I think "we might amuſe the public with the ſound of liberty," but ſhould really enjoy none. If ſuch warrants were to be allowed legally juſtifiable in any inſtances, it would be exceedingly difficult, nay, impoſſible, to reſtrain Miniſters from grievouſly oppreſſing any man they did not like, under many pretences, from time to time, for their own ſafety, without any motive of public good. I agree, therefore, with the Attorney, in ſaying, that "if the liberty of the ſubject be the great "object in view, and be incompatible with General

"War-

" Warrants in one inſtance, it is inconſiſtent with the ſame " warrants in any other. There is no exception to be " made to our *general* reaſoning." The grievance extends to all perſons, of all degrees, of all qualities; it is *commune periculum*.

As to the ſuggeſtion that experience has proved " there " is only a poſſibility of danger to the liberty of the ſub- " ject, from the exerciſe of this power," it is a moſt ſlippery argument, and of no real weight whatever.

For, in the firſt place, theſe warrants have been rarely exerciſed, until of late years, and perhaps never before, in the caſe of a libel, upon one of the Repreſentatives of the people. Every thing of this ſort is practiſed with ſome tenderneſs at firſt. Tyranny grows by degrees. Beſides, few common men have private purſes ſufficient to contend with That of the Public and the power of the crown, both of which are uſed by every miniſter, to the utmoſt extent, upon ſuch occaſions. Sometimes too, the private proſecutor is bought off.

In the next place, if the experience of theſe warrants had been ſo great, and no miſchief to the ſubject had hitherto enſued; yet, who, in a very momentous concern, no leſs than the liberty of every man in England, would let even a poſſibility of abuſe remain, that was able to get rid of it. It is not within the power of any legiſlature to prevent every private man or miniſter from committing abuſes by an infraction of the law; but, I think, no wiſe legiſlature would give ſuch a ſanction to any bad or arbitrary uſage, as would afford a *handle* to all miniſters to be guilty of the greateſt abuſes, impunedly, and under the colour of law.

Upon a ſuppoſition that the foregoing arguments will not do, the Attorney cloſes his ratiocination on this point, with ſaying, that " the Court of King's Bench had ad- " mitted perſons to bail, apprehended under ſuch war- " rants, inſtead of giving them their full diſcharge, and " that this circumſtance is of ſo much importance to the " queſtion, of the legality of the warrants, that in the " opinion of an old experienced and able Lawyer upon " the occaſion, who will ever be eſteemed an honour to " his profeſſion, it implies no leſs than an imputation of " perjury, to ſuppoſe ſuch practice to have prevailed in " the

" the Court of King's Bench, unleſs the legality of the " warrants had been at the ſame time acknowledged by " that Court." Now, who this old Lawyer is, I don't know, nor the date of the friendſhip between him and the Attorney. But, if I were to gueſs, it muſt be ſome antiquated Tory, who till lately was as uniformly againſt, as he now is uniformly for, all meaſures, and who only comes out upon extraordinary occaſions, with a grave face, to do extraordinary work. One of your ſtaunch men, that goes plump through thick and thin, and to advance ſuch doctrine, muſt, I think, have gone through the thickeſt of it, and conſequently appear in a very dirty light to all other Lawyers upon his emerging. I dare ſay, 20 years ago, the ſame man would have vouched as ſtrongly to the cure of the King's Evil by the touch of the true royal line. In my conſcience, he could find no one Lawyer beſides to countenance him in ſuch doctrine; or if he did, it muſt be ſome old gentleman of the ſame Tory-kidney. Now, the Tory-principles are ſuch, that I ſhould have been much better ſatisfied of the truth of this dogma, had the Attorney himſelf directly affirmed, upon the credit of his own character as a Lawyer, that an admiſſion to bail under a General Warrant, proves either the warrant to be legal, or the Judge to be perjured. But, it is very ſingular that the Attorney will not affirm any thing of himſelf in this matter, any more than he did upon the article of uſage, but chuſes to ſlip in the aſſertion of ſome antient invalid, or *miles emeritus*, for the purpoſe, whom he puts in the front of the battle; and then, if he can but pick up ſome other ſuperannuating ſtager, of the like original concoction, he will, of the two, form a moſt excellent forlorn hope. By the bye, if any veteran Black Letter could be brought up to ſuch an affirmation, in a grave and ſerious manner, as *amicus curiæ*, I ſhould think, under any other than the preſent Whig adminiſtration, his merit would be ſo tranſcendent, that he might expect the Miniſter's intereſt for a peerage for himſelf, or o-otherwiſe, for his ſon, as he ſhould like beſt. At this time, however, I ſhould imagine, he would only find he had abſolutely thrown away his character to no purpoſe at all. Old Hunters, ſay, there is nothing like trying a man at once at a ſix-bar gate; for, if he ventures to take

take that, you may be ſure of his going over every thing elſe with eaſe.

After all, let me aſk, Does the Court of *King's-Bench*, or any other court, when a man is brought before them, examine into the warrant, unleſs the perſon apprehended makes an objection thereto? Nay, is not the very contrary every day's experience? Is it not even the deſire of the party taken up, nine times in ten, to be bailed; as he knows, upon his diſcharge from that arreſt, another warrant in a regular form would be immediately iſſued? Would it be right therefore in a Judge to ſcrutinize the validity of every *capias?* In truth, bailing is a matter of courſe, where no objection is taken, and there is no pretence for ſaying this act of courſe is an acknowledgement by the Court of the validity of the warrant, or of the regularjty of the arreſt. Every apprehenſion is ſuppoſed to be legally made. A man might as well ſuggeſt, that the Chancellor reads every writ he ſigns, before it is iſſued, to ſee whether it be clerically drawn; or that a Judge never tries a cauſe at *niſi prius*, until he has examined the whole of the proceſs, and ſeen all to be regular. Now, I will venture to affirm that Judges never examine the proceſs at all, unleſs one of the parties move the Court ſpecially for the purpoſe. *Conſenſus tollit errorem.* And, no man ever ſuggeſted that they broke their oaths by not doting this *ex officio*; indeed, if the extravagant doctrine here advanced were true, not one of the preſent reverend bench could now be free from perjury. In ſhort, ſuch a ſpeech, if it were made, is a proof of nothing, but the ſhameleſs length to which party is capable of carrying a Tory: for, no lawyer ever practiſed in a court of law, eſpecially at the head of a great circuit, that did not in his own practice, meet with a multitude of inſtances which flatly contradict this violent poſition. Every common lawyer of a year's ſtanding can vouch the contrary. Nay, were it not ſo, the Attorney knows it to be a maxim among lawyers, that, "what is done without debate, or any argument or conſideration had of it, makes "the authority of a precedent to be of no force in point "of law: for, judgments and awards, given, upon delibe-"ration and debate, only are proofs and arguments of "weight; and not any ſudden act of the court without "debate or deliberation.

The Attorney ſees nothing alarming in the ſeizure of a Member's papers and bureaus upon the charge of a libel only, and reproaches a late writer with "heightening "the picture upon this occaſion, by the introduction of "ſacks and meſſengers." Now, I underſtand nothing is mentioned by this writer, that was not an undoubted fact, and, if I know the Attorney aright, he likes to debate upon a fact, and for that reaſon would throw every circumſtance into a caſe, however unneceſſary this may ſeem to many people, who think it beſt always to argue and determine upon the general principle. Provided then the fact be ſo, I can frame to myſelf no circumſtance capable of adding to the terror of ſuch a ſcene, whilſt laws exiſt, unleſs it be a repreſentation of the whole as tranſacted, and by particular order, at midnight. I chuſe, however, not to dwell upon this lawleſs part of the ſtory, and, as my ſon in his letter hath ſaid a good deal about the abſolute illegality of the ſeizure of papers, I ſhall here ſay very little more concerning this abominable outrage; altho', I think it, to uſe the words of Mr. Somers, "the worſt means to arrive at the worſt ends "imaginable."

According to my notions, no words can convey to the mind of the reader, the anxiety which a man may feel from ſuch a diſtreſs. Many gentlemen have ſecret correſpondences, which they keep from their wives, their relations, and their boſom friends. Every body has ſome private papers, that he would not on any account have revealed. A lawyer hath frequently the papers and ſecurities of his clients; a merchant or agent, of his correſpondents. What then, can be more excruciating torture, than to have the loweſt of mankind, ſuch fellows as Mooney, Watſon, and the reſt of them, enter ſuddenly into his houſe, and forcibly carry away his ſcrutores, with all his papers of every kind, under a pretence of law, *becauſe* the Attorney-general had, *ex officio*, filed an information againſt the author, printer and publiſher of ſome pamphlet or weekly paper, and ſomebody had told one of theſe greyhounds that this gentleman was thought by ſome people to be the author! Theſe papers are immediately to be thrown into the hands of ſome clerks, of much curioſity, and of very little buſineſs in times of peace, who will, upon being bid to ſort and ſelect thoſe that relate to

ſuch

uch and ſuch a particular thing, naturally amuſe themſelves with the peruſal of all private letters, memorandums, ecrets and intrigues, of the gentleman himſelf, and of all his friends and acquaintance of both ſexes. In the hurry too of ſuch buſineſs, notes, bonds, or even deeds, and evidence of the utmoſt conſequence to private property, may be divulged, loſt, torn or deſtroyed, to his irreparable injury.

I will now, for a moment, ſuppoſe that this gentleman had actually wrote, in the hours of his wantonneſs or folly, ſomething that was really abuſive and ſcandalous upon ſome particular miniſter, or upon the adminiſtration in general. Even in ſuch a caſe, would any gentleman in this kingdom reſt one minute at eaſe in his bed, if he thought, that for every looſe and unguarded, or ſuppoſed libellous expreſſion, about party-matters, he was liable not only to be taken up himſelf, but every ſecret of his family made ſubject to the inſpection of a whole Secretary of State's Office, or indeed, of any man or miniſter whatever, whilſt a parliament was ſitting, or had even an exiſtence in the country?

Such a vexatious authority in the crown, is inconſiſtent with every idea of liberty. It ſeems to me to be the higheſt of libels upon the conſtitution, to pretend, that any uſage can juſtify ſuch an act of arbitrary government. The laws of England, are ſo tender to every man accuſed, even of capital crimes, that they do not permit him to be put to torture to extort a confeſſion, nor oblige him to anſwer a queſtion that will tend to accuſe himſelf. How then can it be ſuppoſed, that the law will intruſt any officer of the crown, with the power of charging any man in the Kingdom (or, indeed, every man by poſſibility and nobody in particular) at his will and pleaſure, with being the author, printer or publiſher of ſuch a paper, being a libel, and which till a jury has determined to be ſo, is nothing; and that upon this *charge*, any common fellows under a general warrant, upon their own imaginations, or the ſurmiſes of their acquaintance, or upon other worſe and more dangerous intimations, may, with a ſtrong hand, ſeize and carry off all his papers; and then at his trial produce theſe papers, thus taken by force from him, in evidence againſt himſelf; and all this on the charge of a mere miſdemeanor, in a country of liberty and property. This

would be making a man give evidence againſt and accuſe himſelf, with a vengeance. And this is to be endured, becauſe the proſecutor wants other ſufficient proof, and might be traduced for acting groundleſly, if he could not get it; and becauſe he does it truly for the ſake of *collecting evidence*.

I ſhould not have given myſelf the trouble of ſaying thus much in ſo plain a matter, had it not been for a letter which was printed ſome time ago, upon this ſubject, with the names of two noble lords, ſecretaries of ſtate, ſubſcribed. It is directed "to Mr. Wilkes," dated "Great "George-ſtreet, May the 7th, 1763," and contains the following expreſſions:

"SIR,

"In anſwer to your letter of yeſterday, we acquaint "you, that your papers were ſeized in conſequence of the "heavy charge brought againſt you, for being the au- "thor of an infamous and ſeditious libel, for which, not- "withſtanding your diſcharge from your commitment to "the Tower, his Majeſty has ordered you to be pro- "ſecuted, by his Attorney-general. Such of your papers "as do not lead to a proof of your guilt, ſhall be reſtored "to you: Such as are neceſſary for that purpoſe, it was "our duty to deliver over to thoſe, whoſe office it is to "*collect the evidence*, and manage the proſecution againſt "you. We are

"Your humble Servants,

"Egremont.
"Dunk Halifax."

Here now is a clear avowal of the principle of taking theſe papers. The evidence indeed, ſeems to have been *collected* with as much force, and I believe with as little right by law, as ſome other collections are made for which the collectors are hanged when taken. I cannot but ſay, therefore, I am very glad this letter has been publiſhed, that the Public may ſee what is the notion of law in thoſe political offices, that are now attempting to prove their lawleſs practices to be the ancient common law of the Land.

One

One Inſtance of the legiſlature's regard to the privacy of papers and correſpondence, may be ſeen in the act regulating the poſt-office, whereby, every poſt-maſter and clerk, is forbid to *open* any letter, upon any pretence whatever, except, by warrant of one of the principal Secretaries of State; who, if the mere opening ſhould afterwards be queſtioned, is thereby rendered under his hand reponſible for the ſame.

When the D. of Newcaſtle was miniſter, under a general ſweeping warrant, the meſſengers ſeized ſome copper-plates of the late Rebel's victories, whereupon the owner commenced an action; ſhortly after which, Mr. P. his attorney, was called upon by a certain noted ſolicitor, who told him, that the Government would not return the plates, but would, however, make ſatisfaction for them. Mr. P. ſaid, that he would not diſſuade his client from making up the matter, but, that as the ſeizure was wholly unwarrantable, he muſt be handſomely repaired in damages, and therefore he would not adviſe him to take leſs than 200l. upon ſuch an occaſion. The noted Solicitor agreed to, and paid the ſum demanded, upon having a releaſe of the action; altho' it was very clear, the real injury did not amount to 50l. Thus dropped and expired this action, as has been the caſe with many others before and ſince. In ſhort, one way or other, the proceedings in theſe matters never come before the Public. The Parties are either too indigent to contend with the crown, or elſe the Crown buys them off. Attornies too, for the moſt part, are afraid both of incenſing men in power and of loſing their coſts, by being concerned for poor and obnoxious clients, who may either run away, or be tampered with by the Solicitor for the Treaſury. For which reaſons, it is extremely difficult to cite adjudged caſes, in ſuch very clear points: and, therefore, one muſt decide upon them by general maxims and principles of common law, which are, indeed, a much more unerring guide than any particular caſe, of which it is ten to one whether you can obtain any correct and authentic report.

If ſuch a power of ſeizing papers could be ſupported by law, is it to be imagined, that no declaration of it ſhould have been made from the Bench, by the ſeveral able and learned Chief Juſtices of England, who have preſided in the King's Courts ſince this practice has taken place?

place? Many of them have been warm friends of adminiſtration, and they could not have rendered a miniſter ſo formidable, eſpecially in times of violent party and diſaffection, by any other means whatever. Nay, ſome of them have had opportunities of making this declaration, and yet have ſtudiouſly avoided it, for which no reaſon can be aſſigned, but their knowing the practice to be illegal. A ſtronger negative argument can hardly be produced.

Nothing, as I apprehend, can be forcibly taken from any man, or his houſe entered, without ſome ſpecific charge upon oath. The manſion of every man being his caſtle, no general ſearch warrant is good. It muſt either be ſworn that I have certain ſtolen goods, or ſuch a particular thing that is criminal in itſelf, in my cuſtody, before any magiſtrate is authorized to grant a warrant to any man to enter my houſe and ſeize it. Nay further, if a poſitive oath be made, and ſuch a particular warrant be iſſued, it can only be executed upon the paper or thing ſworn to and ſpecified, and in the preſence of the owner, or of ſomebody intruſted by him, with the cuſtody of it. Without theſe limitations, there is no liberty or free enjoyment of perſon or property, but every part of a man's moſt valuable poſſeſſions and privacies, is liable to the ravage, inroad and inſpection of ſuſpicious miniſters, who may at any time harraſs, inſult and expoſe, and, perhaps, undo him. Nay, whenever they ſuſpect there is evidence againſt themſelves, they may, by this boundleſs authority, ſeize and carry it away, in order to defeat proſecution.

In miſdemeanor, felony or treaſon, before conviction, the perſonal property of the accuſed, remains unaltered; no magiſtrate has a right to examine the whole, nor to touch or ſeize any particular part, without ſome ſpecial information on oath as to individual things. And upon what legal foundation a contrary practice has been ſet afoot, I am totally at a loſs to gueſs.

L. C. J. Hale lays down theſe rules, as to warrants to ſearch for ſtolen goods, "(1.) They are not to be granted without oath, made before a Juſtice, of a felony committed, and that the party complaining has probable cauſe to ſuſpect they are in ſuch a houſe or place, and do ſhew his reaſons for his ſuſpicion; and there-

" therefore a general warrant to ſearch all ſuſpected " places is not good ; nor are general warrants dormant, " juſtifiable, nor do they give any more power to the " officer or party, than what he had without them. " (2.) It is fit to expreſs that ſearch be made in the day-" time. (3.) They ſhould be directed to conſtables and " not to private perſons, tho' the perſon complaining " ſhould be preſent, becauſe he knows his goods. (4.) It " ought to command that the goods found, together with " the party in whoſe cuſtody they are found, be brought " before ſome Juſtice of the peace."

The firſt warrant that ever was granted for ſeizing papers generally, was, by Lord Townſhend, in the reign of George the Firſt ; until that time, no ſecretary of ſtate ever went farther than to direct the ſeizure of ſome papers particularized.

In ſuch a party-crime, as a public libel, who can endure this aſſumed authority of taking all papers indiſcriminately ? When, in ſuch a crime as forgery, or any other felony ; or even in that dangerous crime, high treaſon, by correſpondence with traitors or the king's enemies, all men would cry out againſt it, and moſt deſervedly ! Nothing can be touched, without ſome criminal charge in law ſpecifically ſworn againſt it. And where there is even a charge againſt one particular paper, to ſeize *all*, of every kind, is extravagant, unreaſonable and inquiſitorial. It is infamous in theory, and downright tyranny and deſpotiſm in practice. We can have no poſitive liberty or privacy, but muſt enjoy our correſpondencies, friendſhips, papers and ſtudies at diſcretion, that is, at the will and pleaſure of the miniſters for the time being, and of their inferior agents !

Had Charles the ſecond thought his miniſters intitled to this prerogative, he would not have reſorted to parliament for ſweeping warrants, to ſearch for and ſeize all ſeditious and treaſonable books and pamphlets. His meſſenger of the preſs would have ranged through the ſhops of bookſellers and printers, and the ſtudies of diſaffected perſons, that is, of ſticklers for liberty, upon the mere warrant of a Secretary of State or privy counſellor, without the aid of a licenſing ſtatute.

And let me here aſk a queſtion. If a libel be no actual breach of the peace, and ſureties for the peace or the be-

behaviour be not demandable of the ſuppoſed libeller; by what colour of law, or by what warrant or capias, can any man, charged as the writer or publiſher, have his doors or locks broken open, for the apprehenſion either of himſelf or his papers? Can ſuch force be authorized by virtue of any legal proceſs whatever, in this ſpecies of miſdemeanor, before verdict, nay before judgment *?

Nevertheleſs, I have heard, that a candid lawyer has lately engaged for the ſeizure of papers, declaring "no government can ſtand without ſuch a power." But the ſpeech or the ſcripture of a trimming man, is not, I hope, to be counted for goſpel. And, I am clear, that many glorious governments have ſtood without it, and that no adminiſtration or government ought to ſtand, that wants it. However, it is eaſy to foretel that ſo flattering a ſubſcriber to any political tenets, cannot long himſelf withſtand any thing. He would be able, I ſhould think, if occaſion preſented, to throw himſelf at the feet of any Majeſty, with as much affection and ardency, as the moſt

* In a printed account of the tranſaction of Mr. Wilkes's caſe, it is ſtated thus: "*The 26th of April*, a general Warrant was iſſued againſt the Authors, Printers and Publiſhers of No. 45, and 49 Perſons were apprehended by it before the 29th, and among them a reputable tradeſman. This laſt was taken out of bed from his wife and a child dangerouſly ill, his houſe diſordered and his papers ranſacked, and his perſon detained three days after his innocence known. *The 29th*, the Secretaries of State received complete information that Mr. Wilkes was the author and publiſher; and the general warrant ſtill remaining in the meſſengers hands, by virtue thereof, on *the 30th*, Mr. Wilkes's houſe was forcibly entered, his doors and locks broken open, all his papers thrown into a ſack and committed to the hands of common meſſengers, without any ſchedule or ſecurity for the return of them. Mr. Wilkes himſelf was carried before Lord H. where it was immediately made known, that an *Habeas Corpus* was applied for and expected every moment, but, to avoid the effect of that writ, he was hurried away to the Tower, and there all acceſs was denied to him, as well as the uſe of pen, ink and paper." And I will add, from my own knowledge, that thoſe who had the ſearching of his papers divulged the contents of ſome private letters, which might have been very prejudicial to the writer of them, and have hurt his intereſt and his friendſhip with other friends.

It has has been aſſerted that, in ſearch of Monſieur D'Eon, found a libeller by a Jury, in order to take and bring him into the King's Bench to receive judgment on the verdict, the doors and locks of chambers, cloſets and ſcrutores, were broke open; altho' it was denied he was there, and it afterwards appeared he was not there. This was ſaid to be done by virtue of a Capias from the K. B. but without any information upon oath of his being in ſuch houſe, and merely upon a ſlight ſuſpicion, that he might be there, grounded upon his having been ſeen about two months before going to the houſe.

pro-

proſtrate or adulatory of *Hague*-miniſters. An outward decency and deliberation, in every ſtep, will enable a man, at laſt, to ſerve the more effectually, and even to impoſe a wrong ſenſe upon the old revolution motto, of *Prodeſſe quam conſpici*. And yet there is, after all, ſuch a thing as outwitting one'ſelf, and being the dupe of one's own cunning, after having made this left-handed wiſdom the ſtudy of one's life from the tendereſt infancy.

The Attorney having ſlightly paſſed over the ſeizure of papers, after talking of it as a mere picture for which he happened to have no taſte, *intirely* omits the ſubſequent grievance of the *cloſe* confinement; and, my ſon having ſomewhat touched that matter in his letter, I ſhall not expatiate upon the ſubject, ſo much, at leaſt, as the importance of it would otherwiſe have inclined me to. Any body, however, who looks at the warrant of commitment, will ſee the direction to the conſtable of the Tower, is not merely to keep Mr. Wilkes ſafe, but "to keep him "ſafe and *cloſe*, until he ſhall be delivered by due courſe "of law." Now, the cuſtody here directed, is unwarrantable by law, in the caſe of a miſdemeanor, nay, in any caſe.

The common commitments uſed by Juſtices of the peace, even in caſes of robbery on the highway, and other felonies, not entitled to clergy, are *to receive into your gaol, and him ſafely to keep*, or *that you ſafely keep*, or *there to remain (until delivered by law)*; *ſalvo cuſtodiri, ad ſalvo cuſtodiendum, ſalvo cuſtodias, in ſalva cuſtodia ut detineatur*, or at moſt *ſalvo & ſecure cuſtodiri:* inſomuch, that out of all the various forms of mittimus's to be met with in *Burn's Juſtice*, or the *Regiſtrum Brevium*, there is not one where the word *cloſe*, or *arcta*, is inſerted.

When a gaoler is to keep his priſoner ſafe, he is only to reſtrain him ſo as to prevent his eſcape, and no perſon not dangerous, in that reſpect, is to be hindered from having acceſs to him, in the day-time. But, when the order is to keep the priſoner ſafe and *cloſe*, the gaoler is to ſhut him up from all the world. By a printed paper too, handed about, I learn that the wardens of the Tower, in this laſt caſe, are never to leave their priſoner one moment alone. And, in a paper which Mr. Wilkes diſperſed, he aſſerted that theſe orders were ſtrictly obſerved with reſpect to him, inſomuch, that altho' he was com-

mitted Saturday the 30th of April, yet it was Tuesday May the 3d, after having been brought up by Habeas Corpus to the Court of Common Pleas, and remanded, before his friends had, for the first time, free access to him. His Council and Attorney had made repeated applications for admission on Saturday, Sunday, and Monday, as well as his brother, a noble Earl, and several people of distinction; and on the Monday, he happened to see himself a written order upon Major Ransford's table, directing him even to take down the names of all persons applying for admittance. The common report about town was, that the Secretary of state went to his country-house on the Saturday morning, and did not return till Tuesday noon, and therefore no order for the admission of any person could be had, and that the Major would not break through his general orders about *close* prisoners at the desire of the solicitor of the treasury: but, this could never be the reason, as it was very easy to have sent a messenger 10 or 12 miles out of town, to the secretary's villa, when the prisoner was a Member of Parliament, and the public begun to be alarmed.

I am more inclined to believe another report, namely, that the Major received, particular, positive, verbal orders at first, to let nobody have access to him, and that he declared, had it not been for Those, he should not have scrupled to have let in any of Mr. Wilkes's friends or relations, notwithstanding the word *close* was inserted in the warrant. In short, it was a misconception of the lawful power. The great civil officers imagined there was no difference at all made by the law between the treatment of a prisoner committed for a misdemeanor, and of one for a capital crime, or before or after conviction.

Now, my opinion is, that before conviction the law does not warrant close confinement, so as to debar a friend from access, in any case whatever; and that the same is a breach of the great *Habeas Corpus* law, and of all the statutes *de Homine replegiando*. For, if a man, when apprehended and carried before a magistrate, is, by that magistrate committed forthwith to close custody, so that nobody can get at him, it will be impossible for him to write a letter, or to make an affidavit to get a Habeas Corpus. Indeed, it seems to me to be an absolute deprivation of the right that every subject has to his liberty, "unless it shall appear that the party so committed, is

"de-

" detained upon a legal proceſs, order, or warrant, out " of ſome court that has a juriſdiction of criminal mat- " ters, or by ſome warrant of ſome Judge or Juſtice of " Peace for ſuch matter or offence for which by law the " priſoner is not bailable." This ſtatute of Charles the 2d, takes notice of the " great delays and other *Shifts* " of gaolers and *others*, contrary to the known laws, " whereby many of the King's ſubjects, may be long " detained in priſon, in ſuch caſes, where by law they " are bailable, to their great charges and vexation," and purports to be expreſly enacted, " for the prevention " thereof, and the more ſpeedy relief of all perſons im- " priſoned for any criminal or ſuppoſed criminal matters." Now, if I do not miſremember, the five members were committed to *cloſe* confinement, for ſeditious diſcourſes in parliament, by Charles the 1ſt, and it was the agitation of this very queſtion that firſt ſhook his throne; and yet, I do not know, that, in the caſe of Mr. Wilkes, it has ever been taken notice of at all, either in parliament or in any court of Juſtice.

I look upon cloſe cuſtody in ſuch an offence as a libel, the leaſt definable and the moſt ambiguous of all miſdemeanors, and by conſtruction only a breach of the peace, to be not only abſolutely illegal, but extreme cruelty in itſelf, and, with reſpect to the conſtitution, the moſt lawleſs tyranny that can be exerted by any miniſter, and ſuch as ought to make every gentleman ſtartle, when he thinks of it only.

It is not the corporal injury that conſtitutes, in the eyes of mankind, the dreadfulneſs of the example. It is the force exerted and continued againſt law.

When I ſee a ſecretary of ſtate, obſtinately fighting with the laws of his country, uſing privilege to the utmoſt, notwithſtanding it was the ground of the royal complaint to the Commons againſt Mr. Wilkes, availing himſelf of every practicable eſſoign, and, at length, withſtanding all the proceſs and penalties of a court of Juſtice, to avoid trying the right of a tranſaction, which has never yet been directly given up; and perhaps waiting for an outlawry of his proſecutor, in order then to mock the juſtice of his country ſtill more, by entering an appearance to the ſuit againſt him, at a time, when his proſecutor can no longer go on with it: I proteſt, altho' an

old, ſober, private individual, that I loſe my temper, look for redreſs from ſome other quarter, and feel myſelf inclined to join in an addreſs to the Commons of England, to take up the conſideration, and go on with the proſecution of that cauſe, which every freeman is intereſted in, and which the ordinary courts of juſtice have been ſo long foiled in. I remember what is Mr. Locke's definition of liberty; what he makes the province of a court of judicature; what the extent of the legiſlative power; and what, according to him, creates a diſſolution of all government.

Who, under ſuch circumſtances, would blame a Jury, ſhould they at laſt have ſuch a ſecretary brought before them, for giving extraordinary, exemplary damages, *in terrorem!* Eſpecially, if they ſhould have all imaginable foundation for believing the judgment, upon ſuch verdict, will be delayed by every artifice of bills of exceptions, ſpecial verdicts, motions for new trial, writs of error, *&c.* that can be practiſed, in order to prevent all effect from it, and to overbear, in the long run, the poor proſecutor by dint of expence.

If mankind is to be enrag'd, I really think this is the readieſt way to effect it.

If a queſtionable act has been done by the great officers of a ſtate in any juſt government, and when taken notice of, they avoid a deciſion of the eſtabliſhed courts of law, I will ſay they diſ-ſerve the Crown by ſuch conduct, let who will adviſe it. It is unbecoming men who pretend to an honourable repute or a juſtifiable behaviour, and incredible where an adminiſtration means only to uſe legal powers or deſires to know what they are.

No jury will give great damages where a miniſter pleads law for his excuſe, and readily reſorts to a court of law for its opinion, in order to ſhew the truth of his plea. But where he ſhuffles and cuts, flies to privilege and chicane, and avoids a court of law, or keeps it at bay, he will not only have every preſumption in diſfavour of him, but will raiſe the reſentment of every man; and ſhould the ſlow foot of Juſtice at laſt overtake him, nobody will think it can treat him too ſeverely, as an example to all future miniſters.

How can any miniſter think of eluding the laws, when he conſiders that kings, the ſupreme magiſtrates of this country,

country, hold their crown by no other tenure, and are ſworn and bound to govern by law, at the peril of that very crown itſelf! Our conſtitution admits of no arbitrary will or pleaſure in any man. The law is the ſole ſovereign of England, and That law is known and ſettled, on the firm baſis of immemorial uſage, innumerable precedents through a ſucceſſion of ages, and upon the ſtatutes of kings, lords, and commons. And, it is this circumſtance which makes the ſecurity, the independence, and the pre-eminent felicity of Engliſhmen. What a comfort is it to every man, who either raiſes or inherits a fortune, to hold That and his liberty, by the ſame and as good a title as his King holds his crown? Who, therefore, can ſink ſo low as to ſubmit to enjoy, all that he has, by the mere grace and favour of a man like himſelf, inſtead of holding it independent of every thing upon earth, but the known and neceſſary laws of ſociety.

It would, in my poor opinion, be of infinite uſe to young men of fortune, beginning the great world, who may hereafter be miniſters of ſtate, to read attentively the firſt 15 years of the reign of Charles I. and the laſt 16 years before the Revolution, in the original diaries, annals, memoirs, tracts, and in the parliamentary and cotemporary hiſtories, of thoſe days. They would thereby perceive, what mighty ill conſequences flow from ſmall beginnings, and particularly, from right not being to be had for the ſubject in courts of Juſtice.

The Attorney wonders, what ſhould occaſion any "alarm," and ſays, one would think, "that ſome innocent man had been oppreſſed by arbitrary violence, "tyranny, and perſecution." To which I ſhall only ſay, that the legality of the arreſt itſelf by virtue of ſuch a warrant, and not the innocence of the man arreſted, is the matter in queſtion.

The Attorney might as well talk of the qualities of the writer's mind, and endeavour to ſhew that he was a ludicrous, extravagant, profligate, debauched and blaſphemous fellow, and wrote an infamous poem, whereby he excited the indignation of a grave and pious nobleman, who, from a motive of conſcience complained of him to the houſe of lords, for diſporting himſelf in the works of Vice; and that therefore, ſuch a man might be treated as adminiſtration ſhould pleaſe, without any regard to law or the conſtitution,

ſtitution, and that, inſtead of protecting the franchiſes of their countrymen, the parliament ſhould only ſettle the morals of individuals, like the Courts Chriſtian of Biſhops.

The Attorney concludes on this head with aſking, whether all the printers and other "parties aggrieved, deny "that they have had ample ſatisfaction?" whereby he indirectly admits that they had been *aggrieved*, but then inſinuates, that as money is in his mind the meaſure of all things, and an adequate conſideration either for a broken head or a broken conſtitution, ſo there has been no harm done at all, but what is now compleatly paid for. Let me aſk, were theſe damages offered or even paid voluntarily, ſo ſoon as the unlawfulneſs of the act was diſcovered? Or, were they extorted, by the verdict of a jury, after every means to delay and to defeat the action, to ſtagger the Judge who tried the cauſe (but who was too firm to be frightened, and too able to be impoſed upon) and finally, to ſuſpend indefinitely the judgment upon this verdict, by a bill of exceptions, had been tried in vain? After all this, were the exceptions tendered with ſuch earneſtneſs, and ſo much appearance of ſincerity, ever argued or deemed capable of ſupport in any court of law whatever? Or, were the perſons, who took them, after theſe fruitleſs attempts to delude mankind, under the ſacred names of law and conſtitution, obliged, like convicted jugglers, to give up the game, and, as the laſt ſhift, to buy off clandeſtinely the verdicts ſo publickly obtained, in hopes, by a private barter of ſatisfaction and releaſe from low and ignorant proſecutors, to nick an attorney, who had laboured a juſt and a national ſuit, out of his coſts? Is this, or is it not the Truth; and is, or is it not, a handſome come off, or a reputable way of giving up a great cauſe, where the Crown has thought proper by its Attorney General to take up the defence? *Sume ſuperbiam queſitam meritis.*

But in God's name, what have damages to do with the great point the Attorney is arguing, whether the Commons of England ſhould or ſhould not come to a ſtrong reſolution upon ſuch an infringement of the conſtitution. Moſt people are of opinion, when a power, dangerous at any time to be exerciſed, is made uſe of in an ordinary point unneceſſarily, the parliament ſhould immediately brand ſo violent and irregular a ſtep, and, if the circumſtances required

quired it, ſtigmatize the perſon who took it. The leſs the occaſion was for this illegal act, the more alarming it is, becauſe it looks as if great men choſe to act by the authority of the crown, inſtead of acting by that of the law, and the more it had become of late the uſage to exerciſe this power, that is, the greater ſanction it might ſeem to have derived from any uninterrupted practice of 20 or 30 years, the more neceſſary it might ſeem to come to ſuch a reſolution: eſpecially, too, if this power had been evidently abuſed, by being exerted in the caſe of a miſdemeanor, and even in the moſt dubious of all miſdemeanors, and above all, if it were in a time of the profoundeſt tranquility, when all parties were ſtriving who ſhould be foremoſt in ſhewing their ſincere attachment to the perſon of their Sovereign. A power notoriouſly and confeſſed illegal, ſeems to need no great examination, but if it did, people without doors are apt to think, that thoſe within ſhould have given it that examination, and all the "gravity and deliberation," by going into a Committee, that one of their reſolutions might ſeem to require. It was early in the ſeſſion, when this matter was agitated, ſo that there was no want of time, and it was a point that intereſted peoples attention more than any other.

If the Reſolution were confined to the caſe in queſtion, and ſo drawn as to apply to it exactly, it could neither appear "inſufficient or futile." The conduct of the preſent parliament proves this; for, it has ſhewn that it chuſes to go ſo far as the caſe before it, and no farther. In the matter of privilege recently agitated, the Commons confined their Reſolution, and the Lords followed them therein, to the ſingle caſe of ſeditious libels. And yet the rumour is, that many members of both Houſes thought it a proper opportunity for coming to a general reſolution, taking away privilege from all breaches of peace, whether actual or conſtructive, and from all miſdemeanors whatever. This, therefore, is a flat Anſwer to the Attorney, upon the preſent head. However, I muſt allow it is reported, ſeveral great commoners contended warmly that the Reſolution touching warrants ſhould have been general, declaring General Warrants illegal in all caſes whatever. It appears too, that the motion firſt made to the houſe was for the warrant itſelf*, which might have been a ground

* See the printed Votes,

for

for one reſolution of this kind, and for another of the like kind, upon the ſeizure of papers; or, for a reſolution upon the particular warrant only. This motion was rejected. Then a motion was made for a reſolution *That a general warrant for apprehending and ſeizing the authors, printers, and publiſhers of a ſeditious libel, together with their papers, is not warranted by law.* The houſe received it, but by amendments narrowed it ſtill more, in order to bring it to the individual warrant that had iſſued, and to add thereto facts relative to the practice of ſecretaries of ſtate and courts of law. At laſt the reſolution adopted by the houſe for its queſtion was this, That a general warrant for apprehending and ſeizing the authors, printers, and publiſhers, of a ſeditious and treaſonable libel, together with their papers, is not warranted by law; *altho' ſuch warrant has been iſſued according to the uſage of office, and has been frequently produced to, and ſo far as appears to this Houſe, the validity thereof has never been debated in the court of King's Bench, but the parties thereupon have been frequently bailed by the ſaid court.* And, it is ſaid, the King's attorney and advocate general were the perſons who moved and enforced all theſe narrowing, qualifying, and apologizing amendments.

However, as the preſent parliament has, in theſe two inſtances, ſhewn its approbation of coming to reſolutions only upon the caſes that have actually happened; neither the Attorney nor myſelf, are at liberty to gainſay it. As they have adopted it, I cannot ſuffer myſelf to ſay, that "a re-"ſolution upon the journals, confined to the caſe of ſedi-"tious libels only, left the warrants, in all other caſes, ſtill "more confirmed and authorized by that tacit approbation." I do not think ſo. And I will venture to aſk him, whether he thinks that the parliament, by declaring no privilege lies in the caſe of that ſingle miſdemeanor, a libel, has thereby tacitly approved and confirmed its privilege in all other miſdemeanors. I ſhould rather reaſon, that when a parliament condemns any thing in one caſe, it intimates a diſapprobation of every ſimilar caſe and of every the like ſpecies, altho' not named expreſly in their reſolution. Indeed, were I capable of thinking that the Gentlemen, who oppoſed the general reſolution firſt propoſed about warrants, and ſtated, contended for and carried a reſolution adapted only to a particular caſe, which the Houſe there-

thereupon took for its queſtion in the debate, intended thereby *a tacit approbation* of, and *more* to *confirm and authorize* the practice of General Warrants in all caſes but that, I confeſs, I ſhould be more alarmed than ever. But, I dare ſay, the Attorney here reaſons from himſelf, and not from any Authority of ſtate.

But the Attorney, however, is afraid that the Lords might differ from the Commons, either as a houſe of parliament, or as a court of judicature. This is impoſſible in a perfectly clear caſe. Nay, I can rid him of ſuch fear, by what happened this very ſeſſion. Let him only look back to the proceedings, and he will find that the preſent parliament took notice of *The North Briton No.* 45, in conſequence of the King's meſſage, and upon the mere view of the paper itſelf, without inquiring into the truth of any circumſtances, that the author might rely upon, or the public's opinion of his intent thereby, determined it unanimouſly to be a libel; and yet, this is not only what great Judges eſteem a mere point of law, but what by ſome is held to be a very difficult point of law. This was done too without any previous communication with the Lords. The Commons even went farther, for they afterwards called for evidence, in order to find out who was the author; and it appearing to them, altho' by witneſſes not upon oath, that one of their own members was, they * expelled him, after ſitting, debating and deliberating on their conduct 'till half an hour after three in the morning. Now, this laſt was a fact, which by the conſtitution of this country, is to be tried by a Jury. Nay, the Commons came to both theſe reſolutions, *whilſt the ſame matter was in a courſe of trial* before a Jury *in the courts below*; where it was poſſible that it might be differently determined. For, nobody can tell what a Jury will do in a libel; and they generally determine both the law and the fact, as it is called **: but, ſuppoſe them to be ſo docile as to find

* Vide the printed Votes of Thurſday Jan. 19, 1764.

** This very thing happened in New York in America, where the form of government is the ſame as in England; the Governor, Council and Aſſembly, anſwering to King, Lords and Commons. Now, in the caſe of one Zenger, a Printer, the "Council by their Reſolution, declared the papers "publiſhed by him to be *falſe, ſcandalous, malicious and ſeditious libels.* "As the Jury upon his trial were upon their oaths, and thereby bound to "deliver their own opinions, and not that of the Council, they thought

find only that such a man had published the paper, and to leave the construction thereof to the Court, and that the Judge who presided was one of those intrepid magistrates, who do not care at all for the resolution of a House of Commons upon a point of law: it is surely, very possible, that such a Judge might have made a different determination from what the House had done. And then even this Judgment might have been carried "by appeal to the "Lords, who in their judicial capacity might think fit to "declare the legality of" the paper in question, "to "confirm the practice" of discussing without doors the truth of the speech from the throne, and to affirm the judgment of the King's Bench. Notwithstanding therefore, this matter was in a way of trial below, and notwithstanding the Lords, both as a House of Parliament and a Court of Judicature, might have differed from the Commons, yet they determined both the law and the fact; without being afraid, as the Attorney is for them, "either that the Courts of law must be divided and con-"founded in their opinions, or that the dignity of the "House of Commons must suffer in the neglect and con-"tempt of their resolution." They judged, I presume, that in a clear matter such difference of opinion could not arise, that the paper was clearly a libel, that it was a matter of national moment not to be procrastinated, and that therefore, they not only might, but ought to pronounce their opinion upon it. According to the Attorney's doctrine, a House of Commons should not venture to declare that two and two make four, before a Court of law has told them so. But, in short, this has never been their practice. It is not fit they should interfere where the public is not deeply interested; but where it is, they are bound to do so, in justice to their representatives, and they always have done so. Nay, they have gone further, and where the necessity was great, they have even come to a resolution in point of law, contrary to the judgment of a court of law, and to the opinion of ten out of twelve Judges. Where they suspected any undue influence, ei-

"themselves obliged to acquit the prisoner, by returning a verdict, *not* "*Guilty*; which is the Verdict every Juryman is in conscience bound to "return, if he thinks that the prisoner is not guilty of the crime charged in "the Indictment or Information." Preface to Zenger's trial, which contains many things very well worth reading.

ther

ther in the exertion or the ſupport of the Prorogative, by officers of the crown, or by Judges, they have always interpoſed. Is it poſſible to forget, or to controvert, either their conduct, or the propriety of it, in the great caſe of ſhip-money, which was firſt brought into queſtion by Mr. Hampden, a private gentleman, who ſo far from regarding the trumpery, pettifogging conſideration of damages, declared that he would not pay it, were it but one farthing, if pretended to be demanded of right, and by colour of law, and yet proceeded, according to my Lord Clarendon's own account, with great temper and moderation in that ſuit. His Lordſhip adds, and all the world knows, that never any cauſe had been debated and argued more ſolemnly before the Judges; who, after long deliberation among themſelves, and being attended with the records, which had been cited on both ſides, delivered each man his opinion and judgment, publicly, in court; and ſo largely, that but two Judges argued in a day. Ten of them ſolemnly pronounced their opinion for the right claimed by the crown, and which it had regularly exerciſed for four years immediately preceding: but, as Lord Clarendon obſerves, the judgment proved of more credit and advantage to the gentleman condemned, than to the King's ſervice. However, adds he, theſe "errors in government were not to "be imputed to the court at that time, but to the ſpirit "and over-activity of the lawyers of the privy-coun-"cil, who ſhould more carefully have preſerved their "profeſſion, and its profeſſors, from being profaned by "thoſe ſervices, which have rendered both ſo obnoxious "to reproach." In ſhort, the Houſe of Commons entered into the public grievances, and notwithſtanding the right of levying ſhip-money was a mere point of law, and there had been the aforemetioned ſolemn adjudication by the whole bench of Judges in it, they ordered that the records, inrolments, judgments and proceedings in the Exchequer, and all other courts whatſoever concerning ſhip-money, ſhould be ſent for, and warrants ſigned by the Speaker, directed to the officers of the ſeveral courts for theſe matters were iſſued accordingly. In conſequence of this, a committe was appointed, and upon the report of that committee, the Commons reſolved, "That the "charge impoſed upon the ſubjects, and the aſſeſſments "for that purpoſe, commonly called ſhip-money, are a-

" againſt the laws of the realm; and that all the writs, " commonly called ſhip-writs, and the judgment in the " Exchequer in Mr. Hampden's caſe, in the matter and " ſubſtance thereof, that he was any-wiſe chargeable " thereby, are againſt the laws of the realm." In the matter of libel, they conſidered the caſe of Burton, Baſtwick and Prynn, and reſolved, the judgment and ſentence of the court of *King's-Bench*, to be illegal and unjuſt: and, ſo they dip in the caſe of Lilburn. In the ſame ſeſſion of Parliament, the Commons entered into a conſideration of the eccleſiaſtical power by law, and of " the ſeveral " conſtitutions and canons, treated upon by the Arch-Bi- " ſhops of Canterbury and York, preſidents of the reſpec- " tive convocations for thoſe provinces, with the reſt of " the Biſhops and Clergy, and agreed on, with the " King's licence, in their ſeveral ſynods;" and reſolved, " That the ſaid canons and conſtitutions do con- " tain in them many matters contrary to the King's pre- " rogative, to the fundamental laws and ſtatutes of this " realm, to the right of parliaments, to the property and " liberty of the ſubjects, and are matters of dangerous " conſequence." The ſame parliament likewiſe took notice even of the tranſactions in another kingdom, and reſolved that ſeveral proceedings by the Lord Lieutenant of Ireland were unjuſt and illegal; and that the Judges there were fit to be queſtioned as criminal, for their extrajudicial proceedings and opinions. From multitudes of inſtances, where the Commons have come to a reſolution with reſpect to matters of law, I have only ſelected theſe few, in order to ſhew, that they have done ſo, when the Houſe was filled with great, conſtitutional lawyers, where the ſame point had been already and differently determined by a court of law, and even by all the Judges; in matters of univerſal concern, and in particular caſes, and even with reſpect to libellers, in points of both Common and Eccleſiaſtical law; within and without the realm of England; and that this they have done without any conference with the Lords, and not as a foundation for any bill, and, yet their reſolution has been obeyed and conformed to ever ſince as law, by every court of judicature in the kingdom. A reſolution of the preſent Houſe of Commons would be equally reſpected, I doubt not, whatever big words any man may throw out to the contrary, by every Judge; and

I never

I never knew a dealer in ſuch ſort of ſpeech that had a ſingle grain of true ſpirit or bottom, when he came to be tried. This being the practice of theſe guardians of the people's rights, upon former occaſions, makes me more curious than ever to know, what it was that influenced the preſent parliament, after inquiry and proof of General Warrants being clearly contrary to law, to refrain from condemning the uſage of them. The more eſpecially, as it will appear hereafter by the Votes and Journals, that a groſs complaint had been made of the abuſe of theſe warrants, in the caſe of one of their own Members, and that the debate upon the queſtion of their validity, had been the longeſt to be met with ſince parliaments have had a being. We who are living know very well from the Members of all parties, that nobody attempted to vindicate the legality of theſe warrants; but, our poſterity will not have the ſame oral ſatisfaction, and muſt naturally conclude, from their not being declared illegal, according to the antient uſage of the Houſe in matters of like univerſal concern, that ſomething appeared which rendered the point of law very problematical. Indeed, it muſt from reaſon ſeem to every reader, that altho' the Houſe inquired into the matter, on account of its infinite conſequence, yet, that it could not be warranted in paſſing a cenſure upon thoſe who had uſed theſe warrants, nay, was on the contrary obliged to hold them juſtified, and to diſcharge the complaint againſt them, however much the Houſe might wiſh to damn ſuch warrants, if not in all caſes, yet, at leaſt, in that of miſdemeanors and libels, and with that view had apparently narrowed the firſt propoſed reſolution to one of a particular nature. The natural concluſion * from the printed votes and journals muſt be, that the Commons could not find a ground for condemning General Warrants in all caſes, or even in the ſingle caſe of a libel, altho' accompanied with an order to ſeize papers; inſomuch, that I ſhould think an able man would hereafter allege the preſent proceedings, as a juſtification not only of theſe General Warrants, for the ſeizure of perſons, but alſo of papers, even in the caſe of a miſdemeanor, ſo that this uſage will be apt to gain ſtrength from what has paſſed, as *non regredi eſt progredi* in ſuch an enterprize as this.

* *Vide* the printed Votes of Jan. 20, Feb. 10, 13, 14 and 17, 1764.

The

The ſingle obiter ſaying of a Judge at *Niſi prius*, or even the judgment of a Court of law, will not be ſufficient to reſtrain future miniſters, hurt by what is publiſhed againſt them, from uſing this general, ſweeping power, when they find that a Houſe of Commons will not interfere in the caſe, except to vindicate the perſons who uſe it. For which reaſons, I wiſh, with all my heart, this affair had never been agitated in parliament; becauſe I am ſorry that any time-ſerving Judge hereafter, ſhould have ſo good a pretext for uſing his diſcretion in the determination of the point, and for not being afraid of Parliaments calling him to an account for what he ſhould do.

It is, however, a point of very extenſive conſequence both to the liberty and property of every man, and the Attorney therefore is a little too dogmatical, in concluding that the true queſtion was only, "whether the mini-"ſtry ſhould ſuffer themſelves to be the dupes of a party." A very ſatisfactory apology and vindication, truly! For, as to his round aſſertion, that this is "power which the "beſt friends to liberty had never ſcrupled to exerciſe;" it is *gratis dictum*, untrue in itſelf, and, if it were true, nothing to the purpoſe.

Thus much, I have thought myſelf obliged to ſay, not only in ſupport of my own freedom as a man, but likewiſe in honour of the miniſtry, who muſt, I think, be highly diſpleaſed with the over-weening preſumption of an Attorney, in advancing out of doors, what no miniſter, nor even the Attorney General himſelf, would venture to aſſert within doors.

As to what he has ſaid with regard to the inſignificance of the mere reſolution of the houſe of Commons, I do recollect that ſomething of a like ſort was flung out by one learned gentleman, who, indeed, cloſed the whole of his argument on this point, by ſaying, that "had he "the honour of preſiding in any court of law, he ſhould "regard ſuch a reſolution no more than he would that of "ſo many drunken porters in Covent Garden." It would not, perhaps be "a judicial determination of the "law, which might be pleaded in a court of judicature, "and would only be a declaration of the ſenſe of the "law," by all the commons of England. And without doubt, if the reſolution of one houſe would be of no weight with this gentleman, the reſolutions of both houſes would

would be of none. Nothing but the concurrence of King, Lords and Commons will do for him. And yet, I dare say, he would be confoundedly frightened with a single vote of either house, should he live to experience it. I will not say, that the two houses have ever gone so far as to *make* law, altho', I believe, they have gone so far as to make a King; but this, I am sure of, that they have very often *declared* what the law was, in very great points, and this is all that was contended for. In times more remote, when houses of Commons were not so scrupulous, they have frequently come to resolutions declaratory of the law; as any one may see, by reading an account of their proceedings in the reign of Charles the First, when headed by Sir Edward Coke, Selden, Glanville, and the great lawyers of those days: and this right they continued to claim and to exercise when Mr. Somers, Serjeant Maynard, Sir William Jones, Sir Francis Winnington and other lawyers, undertook to conduct them prior to the Revolution, which last transaction, altho' wearing away very fast in remembrance, is a period of history not yet absolutely forgotten. At that time, some of the men I have named were thought to understand the constitution; they had lived in ticklish times, and studied it closely: nevertheless, I do not, in this respect, mean to compare them with the respectable person I have just now alluded to, altho' they had certainly attended the house much more than he has done.

In those times it was the notion, that, upon any illegal arrest, or other violation, by a great Minister, of a member of their house, it was necessary to come to a resolution forthwith, concerning the law upon that head, without waiting for the slow, and possibly ineffectual, proceedings of a Court of Justice, where a mere mistake, in the manner of pleading, might delay for a year, or possibly frustrate entirely the suit. The parliament was anciently called, *commune consilium regni*, *communis reipublicæ sponsio*. And I cannot even yet regard a resolution of the Commons, in the same light with the Attorney, as "a mere amusement;" because, if by virtue of any resolution of theirs, whether the same may be pleaded in a regular plea or not, a man be committed to Newgate, the Court of *King's Bench* will never venture to question the legality of the proceeding. When the Honourable

Alexander

Alexander Murray was ſo committed, a late great patriot, Sir John Philips, put on his gown, and came into the court on purpoſe " to make a motion, as he phraſed it, " in the cauſe of liberty," and prayed a Habeas Corpus for the ſaid Mr. Murray; which was accordingly granted of courſe. The cauſe of his impriſonment, returned by the gaoler, was only an order of the Houſe of Commons, without any crime alledged. The Judges ſaid they could not queſtion the authority of that houſe or demand the cauſe of their commitment, or judge the ſame; and therefore refuſed to diſcharge the priſoner, maugre all the patriot's arguments to the contrary, and ſo remanded him. Nay, I will mention to the Attorney one other caſe, which will be worth his conſidering, before he ſlights the notice of a reſolution of the Commons. In the year 1689, one Topham, the Serjeant of the houſe, complained, that being ſerved with ſeveral actions, for taking perſons into cuſtody by *order* of the houſe, his pleas of their order in his juſtification, had been over-ruled in the *King's Bench*. The Commons thereupon reſolved, " That " the ſaid different judgments, given in the King's " Bench againſt the ſaid Topham, are illegal, and a vio- " lation of the privileges of parliament, and pernicious " to the rights of parliament; and that a bill be brought " in to reverſe the ſaid judgments;" and they ordered that thoſe of the Judges who were living, ſhould attend; which they did. Sir Francis Pemberton, (who had been the Chief Juſtice) being deſired to give his reaſons for over-ruling the Plea of the *order* of that Houſe, replied, " That he knew little of the caſe, it was ſo long ſince. " But that in caſe the defendant ſhould plead he did arreſt " the plaintiff by order of this Houſe, and ſhould plead " That to the juriſdiction of the *King's Bench*, he " thought, with ſubmiſſion, he could ſatisfy the Houſe, " that ſuch a plea ought to be over-ruled: and that he " took the law to be ſo clearly." He then withdrew; and Sir Thomas Jones (a puiſne Judge) being examined, ſaid, " That it was long ſince, and, not knowing what " he was to attend upon, could give no account thereof; " but, that if any ſuch judgment was given, he hoped it " was according to law, as the matter was *pleaded*;" and then withdrew. Sir F. Pemberton was again called, and his reaſons being demanded for his general aſſertion before-

ſaid,

ſaid, he deſired time to anſwer, both to the whole together, and the particular caſe of Jay and Topham. But an immediate anſwer being inſiſted on, he ſaid, " That " what he ſpoke was *quoad hoc* to that caſe; however, " he gave what he had ſaid, for his preſent thoughts and " reaſon." Being withdrawn, the houſe reſolved, after a debate, That the *orders* and *proceedings* of this Houſe, " being *pleaded* to the juriſdiction of the court of King's " Bench, ought not to be over-ruled." They then ordered theſe two Judges to attend again on another day; when they were ſeverally examined, touching their reaſons for over-ruling the plea of Serjeant Topham to the action brought againſt him by Jay, and ordered into cuſtody of the Serjeant at arms.

The Attorney, however adds, that even the Reſolution contended for would have been of no utility, becauſe it might have been eaſily evaded: and then ſtates two or three cunning devices as " evaſions, which he conceives " would fruſtrate the reſolution, and conſequently render " it, in effect, no ſecurity at all." A change of a word only in the " form, he ſays, would ſubject us to the ſame " evil." To evince this, he ſuppoſes a Secretary of State " was to grant a *particular* warrant, deſcribing the per- " ſon, for the ſeizing the papers; and a *general* warrant " for apprehending the authors, printers and publiſhers:" and, thereupon, ſays, " he ſhould be glad to know whe- " ther either of theſe warrants would fall under this reſo- " lution;" and then, taking advantage of the ground he has got, riſes in his demands, and ventures to aſk, " Whe- " ther, if the words treaſonable practices were inſerted " (and endeavouring to excite to treaſon, he ſhould ſuſ- " ſpect to be a treaſonable practice) a General Warrant " might not in that caſe paſs uncenſured, including both " perſons and papers?" Now, I will fairly tell him my thoughts of the matter, and the probable conſequences, had ſuch a reſolution as that contended for been come to.

I take it to be moſt clear, as the law now ſtands, a General Warrant is good in no caſe whatever, for the apprehenſion of perſons or papers, or both; and that a Particular, or any Warrant, for ſeizing the papers, is likewiſe, as the law now ſtands, good in no caſe whatever: and conſequently, that none of all his ingenious contrivances before ſtated, for eluding the law, would be, if

attempted, worth one ſingle ſtraw. Having laid this down, I ſhall proceed to ſay, that, in my poor opinion, if the reſolution had been agreed to as it aroſe out of a particular caſe complained of, it would have looked to the world as if either houſe of parliament, whenever in any particular inſtance this great privilege of a freeman, the liberty of his perſon, were violated in the perſon of one of their own members, and came to their knowledge, they would take immediate notice of it, on purpoſe to expreſs their indignation againſt the outrage, in order to deter all men from doing the like for the future, and to keep freſh, in every bodies minds, the law upon that head. Their declaration in this caſe, where no doubt of the law itſel could be pretended, would have convinced all mankind that, where ever the law was clear, they would not ſuffer it to be violated by any perſon, ever ſo high, or ever ſo great, without their immediate inquiry, and the fixing of an indelible brand for ſo dangerous an offence. Poſterity would have ſeen in the journals, by the very caſe before the houſe, that the reſolution was adapted to it, neither falling ſhort of, nor going beyond it; and from thence too would all men judge how unadviſeable it muſt be for any man, to infringe the liberty of the ſubject in any one point. From this inſtance they would naturally reaſon to others. Therefore, hardy as the Attorney is, I believe that, after ſuch a reſolution, he would not venture, on any quirk grounded in the change of a word, to have attempted aught againſt the ſpirit or words of the reſolution, by the ſeizure of any member, or indeed, of any man; or, if he did, that the vengeance of the Houſe, which he had ſo trifled with, would have ſwiftly purſued, overtaken and puniſhed him. The Commons of England would not, in a great conſtitutional point, between Miniſters of the Crown and repreſentatives of the people, endure that kind of quibbling which is tolerated between mere private parties in diſputes of between *meum & tuum*, in ordinary cauſes, in courts below.

The Attorney, indeed, ſoon after, advances a very comfortable piece of news, which, is, that, "the queſtion of "the legality of the warrant in queſtion has been decided "in a court of judicature." I hope he is right in his information, and am very glad to hear it, but cannot help ſaying, that I never have heard ſo much before; altho' I think

think ſomebody did once tell me, that in a *trial at niſi prius*, where this and another point were in queſtion, the Chief Juſtice of the Common Pleas did deliver his *own* ſentiments about the warrant itſelf. But this cannot poſſibly be what the Attorney alludes to, as it was only the *dictum* of *one* Judge at *niſi prius*, where this too was not the only point, but mingled in fact with others; and where no *judgment* has been given upon the verdict, by reaſon of the bill of Exceptions: which therefore is nothing, cannot hereafter be cited in argument as an adjudged caſe, and by no means comes up to an *actual deciſion of a court of judicature*; as, That always implies, that the point of law was ſolemnly argued upon a ſtated queſtion, before one of the ſupreme courts of law, that is, a bench of Judges, and by them deliberately determined and adjudged.

As to the allegation of its being "in the power of any "one of the parties acting *under* that warrant, to have "brought it into iſſue at his option;" what is that to the party injured and acted *upon*, if *he* had it not in his power to have done ſo?

But without entering into all the obliquities of chicane, which may be practiſed to delay for two years together, if not entirely to prevent, any determination; there are many people who will never believe, that for ſuch a reaſon alone, any Houſe of Commons, in an eſſential point of liberty, touching one of their own members, would wait, eſpecially in a clear caſe where the law was not doubtful, to ſee what might or might not be done in any inferior court, but would immediately come to a ſtrong reſolution in behalf of the ſubject at large, that ſhould in their printed votes pervade the whole kingdom; and not leave any country gentleman, or other unlearned man, in a future caſe of a like ſort, to ſend for information to ſome practitioner of the law, before he could tell what to do in the matter.

Where the birthright and immemorial franchiſe of the ſubject has been broken, why ſhould not the Commons, when aſſembled, come to a reſolution; after a complaint made to them, the fact apparent, the law certain? Would it not have been conſtitutional? Would it not have been ſatisfactory? When it was directly advanced, that it would be an inſult on the underſtanding of mankind, to pretend that the uſage of a political office could overturn or ſuſ-

pend the law of the land; did any one man attempt to gainſay or contradict the poſition? And if, a recent determination at law by any Judge had been upon the point; is it not an additional reaſon for the houſe not heſitating about a damnatory reſolution? Or, if as was before urged, perhaps a little inconſiſtently, the point by ſome means or other, was ſtill hanging undecided in the courts below; was it not ſo much the more neceſſary for the parliament to prevent any ſuſpenſe thereby in people's minds, about their clear birthright? Nay, as every body knows that the preſent Houſe of Commons is independent, whatever others may have been; will not the reception, the diſcuſſion by the longeſt debate in the journals of parliament, and the ſubſequent ſuſpenſe and indeciſion of the point, make men who had no doubt before, begin to doubt a little now? What ſhould make a free, conſtitutional and independent part of the legiſlature, when appealed to by one of its own members, (I may ſay fled to, as an aſylum from the violence of thoſe pretending the authority of the crown,) refuſe to come to a deciſive reſolution in favour of their own and every other Engliſhman's boaſted inheritance? May not this create a doubt in many a ſenſible man's mind where there was none before? If the times had been arbitrary, men might have thought the crown perhaps had interpoſed, and that the Commons were therefore afraid to perſiſt in the aſſertion even of their known rights. But there not being the leaſt ground now for ſuch a ſurmize, it will make many men at a loſs how to account for the parliament's taking up the matter, conſidering it, and then coming to no reſolution at all, but adjourning it *ſine die*. The point was ſo great, that never were the eyes of mankind more fixed upon their repreſentatives. Indeed, I never ſaw more ſtir in the Houſe itſelf, every body preſſing his friend to ſtay and vote: the Secretaries of the Treaſury, and other men of conſequence, were remarkably active; and every thing wore the face of a deciſive day. Why, after all, no reſolution was come to, I never could learn. I am ſure what has been urged without doors, has not the leaſt ſemblance of reaſon or conſtitution. Indeed, in all my reading of paſt times, I have never met with any like it. On ſuch points, the Commons ever uſed to proceed to a ſtrong reſolution. What therefore influenced the miniſters on that day, I can-

cannot gueſs, unleſs it be what I dare not name. The common report is, that they carried their point, in coming to no reſolution, but by fourteen; that during the debate, they were apprehenſive the majority would be againſt them; that many of their very beſt friends voted, and ſome even ſpoke againſt them; that ſome ſons left their fathers, and others with difficulty went out of town; that many members, who had not attended the whole ſeſſion before, came down, ſome from ſick-beds, others from foreign parts; and yet, after all, altho' the Houſe ſat two days on the matter, the firſt day from three in the afternoon through the whole night, till near ſeven the next morning, and the other day till half an hour after five in the morning, the deciding reaſons againſt coming to the reſolution propoſed, prevailed only by a majority of fourteen. The crowd and agitation of people about the Houſe was inexpreſſible; ſubſtantial old citizens, who could not ſleep from concern, ſtopped members as they paſſed in their chairs, to know the event; in ſhort, the face of mankind could not ſhew more diſtreſs, if the conſtitution had been actually giving up to a Stuart, in one of its moſt eſſential and vital parts, by a Tory and paſſively obedient parliament. And why all this? I am curious to know; I muſt again from my heart declare, and I conjure, therefore, thoſe who do know, to give the public their reaſons for the ſame.

What "neceſſity of peculiar circumſtances," the Attorney may think there ſhould be "abſolutely to require "their interpoſition," I know not: but I ſhould imagine theſe few circumſtances would be fully ſufficient; namely, that the act complained of was committed in time of public tranquility, without a colour of law, by a King's miniſter, upon one of the repreſentatives of the people, in a free country, on a charge of the moſt diſputable of all crimes, which is at moſt but a miſdemeanor; when too, however apparently libellous the words might ſeem without doors, *perhaps* (to borrow a common word with the Attorney) no man would ſay, they would have been deemed libellous, had they been uttered by any member in his place within doors, ſince the memorable caſe of The Five Members.

Moreover, to return to the reſolution propoſed, where a practice has obtained in a high office, which is clearly contrary

contrary to law, and it is a matter that nearly affects the perſonal privilege of every freeman, it ſeems to me that the very thing which a Houſe of Commons would naturally do, is, to come to a reſolution, damning that practice, and to go no farther; for to bring in a bill upon the occaſion, would look as if a new law was neceſſary, becauſe prior to that the practice had been eſteemed legal, or at leaſt very dubious. The bringing in a bill would be countenancing, in ſome meaſure, what had been done, and look like a new regulation ſetting a-foot. Beſides, an act parliament newly made, is not ſo venerable in the eyes of the world, or ſo ſecure againſt future alterations, as the Old Common Law of the Land, which has been from time immemorial the inheritance of every Engliſhman, and is, on account of its antiquity, held, as it were, ſacred in every man's mind.

If a matter of conſtitutional concern and alarm be ſtirred in the Houſe, and the Members do not ſeem clear about the law, it is natural and uſual for the Houſe to go into, or appoint a Committee, for the purpoſe of looking into precedents, to ſee how the Houſe has acted in ſimilar occaſions, and what the conſtitution is; but, when the matter is ſo clear at the very firſt bluſh, that nobody has any doubt about it, one cannot readily frame to one's mind any reaſons againſt coming to a reſolution at once that may ſatisfy the Public. To call for caſes of this having been done is unneceſſary, becauſe the nature of the thing ſhews it is right. Some things are ſo plain of themſelves, that no caſe can make them plainer. This power of interpoſition in the Commons, flows of neceſſity from the nature of the government; they could not be the grand inqueſt of the nation, the great council of the realm, ſponſors for the republic, or guardians of the rights of the people, without poſſeſſing it. To ſuppoſe that they have the power of inquiring, and that it ſhould be proper for them ſo to do, and yet not come to any reſult, in conſequence of ſuch their inquiry, ſeems to be paſt underſtanding: and, where a matter is among the firſt principles of the conſtitution, it is in vain to be looking for caſes to prove it; nay, ſuch a proceeding would look as if this right could not be put in uſe, unleſs ſome inſtance of its having been exerted were produced to warrant the exerciſe of it. But, indeed, there is another reaſon why ex-

examples need not be cited, which is that they are ſo numerous, that no man can read through the times of the four Stuarts, without finding the journals of Parliament full of them.

As to the inſtances quoted and ridiculed by the Attorney, it ſeems to me that they directly apply to the main hinge of the diſpute, that is, to the practice in Parliament of interfering by reſolution in matters of law; nay, they go ſtill farther in point, for they prove that the Houſe has interfered by reſolution in matters of law, where precedents and practice were cited, and admitted, in ſupport of the malefactor; and that this had been done, not only in caſes of public concern, but even in a private caſe, where the illegal warrant itſelf had been iſſued at the deſire of a father againſt one of his own children, upon a mere family motive. In this laſt caſe, the ſimple fact was this, Lord Danby fitted out a ſmall veſſel with arms, unknown to his father the Marquis of Carmarthen, Lord Preſident of the Council, who acquainted Lord Nottingham, the Secretary of State, with it; he had not time to put this information into writing, nor was it upon oath, but wrote it, upon memory, for his own ſatisfaction. Lord Danby is taken up, and ſays, "the veſſel was his own, and fitted with "the arms it had before to make uſe of for his diverſion;" which the ſecretary found ſo ingenuous an anſwer, that he releaſed his Lordſhip without bail, upon his promiſe on his word and honour to appear upon ſummons. Some of the Members, however, ſaid, "This proceeding ſticks not "only on the people, but their Repreſentatives may be "in danger. If, by intreaty, a man may be taken up in "this manner, every mother's ſon may be taken up. Na-"tural affections muſt not be uſed to try tricks with the "government. Lord Nottingham granted the warrant "without oath. Howard ſays, it will juſtify Lord "Nottingham, becauſe he had his information from a "Privy counſellor." "I would be ſatisfied whether a "Privy-counſellor muſt not give information upon oath, "as well as another? If this warrant was granted as a "Privy-counſellor, or a Juſtice of Peace, I know no "law for it; for, if ſix Privy-counſellors do it, and here "is but one, it is worthy your conſideration. If as a "Juſtice of Peace, he cannot take up a man without "oath. If one Counſellor ſhall whiſper to another, and "im-

" impriſon a man, I know not who can be ſafe. If we " take up this now, at the rate elections go at, and the " determination in Sir Samuel Bernardiſton's caſe, they " may have a Parliament as they pleaſe. I know not but " that it may be in the power of one great man to make " a Parliament. I ſhould be loth to go without this be- " ing decided; there would be no ſafety for me when I " am at home. In two months this man may go round " the Houſe thus: I hope, as *Engliſhmen*, we ſhall not " forget our rights; and any man that will do this, is not " fit to be employed in the government. I would not " have it go off that he can warrant the thing. Proſe- " cution of a writ will hinder a member from his attend- " ance. He ſaid, " the warrant is for treaſonable prac- " tices," which is bailable. I hear it moved to refer it to " the Committee of Privileges to inquire into it; but I " think that not fit. From whom will you have informa- " tions? Will you ſend for Lords Nottingham and Car- " marthen? I would have a good correſpondence with the " Lords: the Peers will not come to you, and there will " be a rupture. But if you will come up to the motion, " for your honour and eaſe, vote the breach of Privilege, " and then addreſs the King to take order that the like " be not done for the future. Granting the warrant is a " thing that muſt not be paſſed by ſo haſtily. You will find " few meſſengers that will deny ſuch execution of a war- " rant. The Meſſenger (ſays the Speaker) undoubtedly " breaks your privilege, as well as the bailiff that arreſts " your Member. The bailiff and he that ſues out the " writ againſt a member (adds Mr. *Hawles*) are upon " record; and if you only call upon the perſon who does " officiate, your privilege will be quickly loſt. Whoever " iſſues out the warrant, is more, or equally, guilty than " he that executes it, (ſays old Sir *John Maynard*.) As " this caſe ſtands, a member is impriſoned, and a warrant " is made to take him for *treaſonable practices*; if we take " notice of it, and let a member ſit among us ſo accuſed, " we cannot well anſwer it. We are to vote it a breach " of privilege, and then inquire what thoſe treaſonable " practices are. At this rate we may all be impriſoned, " and whipped to our lives end. Vote it a breach of pri- " vilege, and ſit not mute upon ſo plain a breach. (To " which Sir John Thompſon ſubjoins) He that touches

" the

" the Parliament, touches the vital part of the nation. " The man is not fit to be Secretary that carries about him " the legiſlative authority to commit in this manner. The " Meſſenger had been clapped up, if he had not done it. " Put the queſtion thus; " That granting the warrant with- " out notice, &c. was a breach of privilege, &c." The Houſe then reſolved, " That the granting a warrant to arreſt " the Earl of Danby, a Member of this Houſe, and the " taking him into cuſtody, by virtue of that warrant, is a " breach of Privilege of this Houſe."

The four caſes cited, by *Minority defended*, are perfectly oppoſite to the great queſtion of parliaments interpoſing by reſolution, where the known law has been broken by the hand of power. And, I ſhould think too, that if a caſe conſiſts of four points, and a precedent can be found for each point, That caſe would be fully proved by thoſe four precedents, according to my notion of logic. At leaſt a man who denies the reaſoning on this head, has no right to accuſe his antagoniſt of " unfairneſs and quibbling," as the *Attorney* does throughout; and, from what I ſee of his performance, ſhould therefore imagine he could only do ſo, in order to foreſtall the charge, and to prevent its being applied to himſelf. And ſo far from being angry, as he is, with two of theſe caſes, for being applicable to a Chief Juſtice of the *King's-Bench*, I like them the better for it, and wiſh, that whenever a Chief is found to be clandeſtinely meddling in matters of ſtate, in perverſion of the law, he may be dragged into broad day-light, and his name and memory be branded for ever, to the lateſt poſterity. I cannot, indeed, figure to myſelf a meaner or more pernicious perſon than a Chief Juſtice, with a great income for life, given him by the public, in order to render him independent, privately liſtening to every inclination of every miniſtry, and warping and wire-drawing the plain letter of the law, in order to accommodate it to their inclinations, inſtead of purſuing the courſe of eſtabliſhed precedents, inviolably, intrepidly, and openly, without regard to party or perſon. The chapter of expediency is the very worſt ſource of adjudication, inſomuch as it tends to the ſetting afloat by degrees, the whole law of the realm; and the law of diſcretion is the law of tyrants.

" In our law, the Judges are bound, by a ſacred oath, " to determine according to the known laws and antient " cuſtoms of the realm, ſet down in judicial deciſions and

" reſolutions of learned, wiſe, and upright Judges, upon " variety of particular facts and caſes, which when they " have been thus in uſe, and practiſed time out of mind, " are a part of the common law of the kingdom. And it " is a moſt dangerous thing to ſhake or alter any of the " rules or fundamental points of the Common Law, which, " in truth, are the main pillars, and ſupporters of the fabric " of the Commonwealth. To have no rule to decide con- " troverſies but the rule of equity, is to begin the world " again, and to make choice of that rule, which out of " mere neceſſity was made uſe of in the infancy of the ſtate " and indigency of laws. And to ſet up this rule, after " laws are eſtabliſhed to relieve hard caſes and leave the " matter at large, is it not rather unravelling, by unperceived " degrees, the fine and cloſe texture of the law, which has " been ſo many hundred years making? The laws of this " kingdom are not, now-a-days, to be ſpun out of mens " brains, *pro re nata*."

" To allow of any man's diſcretion (ſays Lord Coke) " that ſits in the ſeat of juſtice, would bring forth a mon- " ſtrous confuſion." It is, indeed, wonderful that any man ſhould have ſo ſervile a diſpoſition; for, let his abilities be what they will, he will always be regarded as a contemptible perſonage. This ſort of profligate magiſtrate may be ſure of being uſed by every miniſtry, but of being eſteemed by none, ſeeing no ſet of men can depend upon him any longer than they remain in office and power; his only principle of action being an implicit obedience to the old tutelar Saint at St. James's. He muſt be, in truth,

> A tim'rous foe, and a ſuſpicious friend,
> Dreading e'en fools.

And " Cowardice in a Judge is but another name for " Corruption."

Since theſe two examples of the Commons declaring the law, even in oppoſition to the practice and deciſions of Chief Juſtices, have been mentioned, I cannot forbear noticing two or three circumſtances in their caſes, which tally moſt ſurpriſingly with ſome of the doctrine I have advanced, and with the cauſe that gave occaſion to it. The committee reported ſeveral caſes of reſtraints put upon Juries by L. C. J. *Keeling*; among other things, that,

that, " in an indictment for murder, which the Jury " found manſlaughter, becauſe they found no malice pre- " pence, he told them, they muſt be ruled by him in mat- " ter of law, and forced them to find the bill, Murder; " and that the man was executed accordingly, without " reprieve, notwithſtanding the addreſs of the Gentlemen " of the Bench to him. That he forbid a Habeas Corpus, " and a Pluries to be iſſued out; ſo that the party was " obliged to petition the King." The Houſe thereupon reſolved (1.) " That the proceedings of the ſaid L. C. J. " are *innovations* in the trial of men for their lives and " liberties. And that he has uſed an arbitrary and *illegal* " power, which is of dangerous conſequence to the lives " and liberties of the people of England, and tends to " the introducing of an arbitrary government. (2.) That " in the place of judicature, the L. C. J. has undervalued, " vilified, and contemned *Magna Charta*, the great pre- " ſerver of our lives, freedom, and property." As to L. C. J. *Scroggs*, there was a great complaint againſt him, for his treatment and diſcharge of a *Middleſex* Grand Jury, before they had preſented all their bills, for arbitrary proceedings in caſes of *libel*, and other matters, and for iſſuing of illegal *General Warrants* for perſons and papers. The Law-members in the Houſe urged, That " if a Grand Jury be diſcharged whilſt indictments are " depending, there could be no proceedings of juſtice. " The Jury was likewiſe blamed by the Chief Juſtice, " and told, *that they meddled with matters which concerned* " *them not.* In former times, Judges had one rule of " juſtice to go by, and another of policy, and if Judges " once undertake *that*, there is an end of all law. Shall " we have law when they pleaſe to let us, and when " they do not pleaſe ſhall we have none? It is aſſuming a " legiſlative power, by which a Judge makes his will a " law. *Do as you have done already in this Parliament,* " *make a vote upon them.* If you do not deeply reſent " this, all your laws will ſignify nothing to poſterity; " for all is at ſtake, if men take upon them to proceed ſo " arbitrarily, and are ſo ſervile as to violate laws for ſelf- " ends. I will not define the offence, but, I think, " theſe proceedings do ſubvert the fundamental laws, and " ſo I would go to the utmoſt ſeverity of judgment. " The firſt violation of *Magna Charta*, was from the

" two Chief Juſtices *Treſilian* and *Belknap*, and theſe " Judges have now taken upon them to ſubvert the " rights and privileges of the ſubject. *My opinion is to* " *make the queſtion before the Houſe general.* In *Scotland* " they have what laws their governors pleaſe to impoſe " upon them; let us take care that our condition be not " brought to that. I would gladly know what way there " is to bring a great criminal to puniſhment but in Parlia- " ment (and we have little hopes there, by what I have " ſeen) if ever you admit judges to let Juries, or not, " inquire into offences as they pleaſe. I think I can re- " member a precedent, when the judges took upon them " to violate the laws, and ſo did violate the King's oath " and their own, and were hanged for their pains; and " I ſhall make no great ſcruple to do it again. Printing I " take now to be free. A ſubject hath, by law, liberty " to write, ſpeak, or print; he may be indicted, if he " tranſgreſs, and it is at his peril, if he offends. Shall " not a man ſpeak unleſs he be licenſed. The Court of " *King's Bench* was at Scroggs's direction. But, if " Judges can be found to make new laws by their inter- " pretation of the old ones; and if Treaſurers can be " found, &c." " A Committee was appointed to exa- " mine the proceedings of the Judges in Weſtminſter- " hall, and to report the ſame, with their opinions there- " in, to the Houſe." Upon the report of the Com- mittee, " the Houſe reſolved, *nemine contradicente*, That " the diſcharging of the Grand Jury by the Court of " King's Bench, before the laſt day of the Term, and before " they had finiſhed their preſentments, was arbitrary and " illegal, deſtructive of public juſtice, a manifeſt violation " of the oaths of the Judges of that Court, and a means " to ſubvert the fundamental laws of this kingdom: That " it is the opinion of this Houſe, that the Rule made by " the Court of King's Bench, againſt printing of a book, " called *The Weekly Pacquet of Advice from Rome*, is " illegal and arbitrary, thereby uſurping to themſelves " legiſlative power: That the court of King's Bench, " in the impoſition of fines on offenders, of late years, " have acted arbitrarily, illegal, and partially: That the " refuſing ſufficient bail in theſe caſes, wherein the " perſons committed were bailable by law, was illegal, " and a high breach of the liberties of the ſubject; and

" That

" That the warrants * iſſued by the King's Bench are " arbitrary and illegal. And it was ordered, That the " ſaid report, and the ſeveral reſolutions of the Houſe " thereupon, be printed; and that Mr. Speaker take care " in the printing thereof apart from this day's other votes." Thus did the Commons behave in the caſe of two Chief Juſtices of the *King's Bench*, and their conduct is ſo deciſive upon the point we now are, that no words can add to the force of it. But there was another thing, which was done in the ſame ſeſſion, that I cannot help relating. The Under Secretary of State, by direction of Sir Lionel Jenkins, Secretary of State, who had received a verbal order from the Clerk of the Council for the purpoſe, writes a letter to a gentleman at Dover, deſiring him to wait upon the Mayor, and direct him to ſeize a man, if he ſhould land there, together with his companions, and detain them until further directions; and in this letter there is incloſed a particular deſcription of the Man, and his name ſaid to be Norris or Morris. The information upon which this letter or order proceeded, was not upon oath. However, when Norris landed, he is taken and carried before the Mayor, who thought it reaſonable to commit him to the common priſon, and to ſeize his papers. When that was done and known, there were two orders of Council

* " Ang. 11. Whereas there are divers ill-diſpoſed perſons, who do daily print and publiſh many ſeditious and treaſonable books and pamphlets, endeavouring thereby to diſpoſe the minds of his Majeſty's ſubjects to ſedition and rebellion: And alſo infamous libels, reflecting upon particular perſons, to the great ſcandal of his Majeſty's government. For ſuppreſſing whereof, his Majeſty has lately iſſued his royal proclamation: And for the more ſpeedy ſuppreſſing the ſaid ſeditious books, libels and pamphlets, and to the end that the Authors and Publiſhers thereof may be brought to their puniſhment:

" Theſe are to will and require you, and in his Majeſty's name, to charge and command you, and every of you, upon ſight hereof, to be aiding and aſſiſting to Robert Stephens, Meſſenger of the Preſs, in the ſeizing on all ſuch books and pamphlets as aforeſaid, as he ſhall be informed of, in any Booksellers or Printers ſhops or warehouſes, or elſewhere whatſoever, to the end they may be diſpoſed as to Law ſhall appertain. Alſo, if you ſhall be informed of the Authors, Printers, or Publiſhers of ſuch books or pamphlets, as are above mentioned, you are to apprehend them, and have them before one of his Majeſty's Juſtices of the Peace, to be proceeded againſt according to law, Dated this 29th of November, 1679.

To Robert Stephens, Meſſenger of the Preſs; and to all Mayors, Sheriffs, Baiſliffs, Conſtables, and all other Officers and Miniſters whom theſe many concern.

W. Scroggs.

to

to the Mayor to ſtop and deliver him to a Meſſenger, who is ſent down on purpoſe to bring him before the Council, in cuſtody; and the papers are ordered to be lodged in the council cheſt. Norris, after being examined, was diſmiſſed, and it was declared there was no farther cauſe of detaining him; and the verbal order firſt mentioned was never entered in the minute-book of the council. Upon this caſe, a complaint is made to the Houſe of Commons, who immediately appoint a Committee to inquire into and report the matter to the Houſe, which is done accordingly. The Members enter warmly into the grievance, and ſome of them ſay, "I would know how the Privy-Council "came to have a deſcription of this man. It may be, "the French Ambaſſador has had ſome influence in "Councils. I do not know what ſtopping a man on the "way or road is, to be immediately ſent up to the Coun-"cil by a Mayor or Officer, upon verbal order. I know "nothing of a verbal order of Council! *In caſes of neceſ-"ſity to commit illegal actions*—theſe are ſtrange aſſertions "for what have been done, or what may be done. The "Thing is all of a piece, for ſome great perſons are con-"cerned in it. Let Gentlemen make it their own caſe. "I ſee not who is to blame, but he that ſigns the war-"rant; nothing appears to you elſe, therefore put a "brand upon it. A parcel of men there is, who abuſe "the King, and ſtill you muſt be tender of them, and "theſe men muſt ſtill be about the King." Thereupon, Sir Lionel Jenkins very honourably took on himſelf the letter written by his Under Secretary, and ſaid, in excuſe of himſelf, that he was but miniſterial in the affair, owned he had the information from a man who had it from another, and that he related it to the Council as he thought it his duty; that he had thereupon a verbal order to ſeize the perſon informed of, and, in conſequence of that, gave direction to his Under Secretary to write the letter beforementioned, and if any thing had been done unjuſtifiable, that he himſelf muſt anſwer it; that he thought it was treaſon for a Romiſh Prieſt to be upon Engliſh ground, and felony in Norris to receive him; and that, in his poſt, he could do no other than obey his ſuperiors; and that he humbly took leave to aver, that a verbal order in a Committee of Council, is what is not entered into the minutes

of

of the council. The Houſe deſired Sir Lionel to withdraw, which he accordingly did, and then they reſolved, "That the late impriſonment of Peter Norris, at Dover, "was illegal; and that the proceeding of Sir Lionel Jenkins, Knight, one of the principal Secretaries of State, "by deſcribing the perſon of the ſaid Norris, and directing ſuch his impriſonment, was illegal and arbitrary;" and they made an order for printing the caſe of Peter Norris at large, which was likewiſe done. Now, here the Commons, without any communication with the Lords, reſolved a point of law, altho' Norris might have brought an action of falſe impriſonment, had the opinion of a court of law, and recovered *damages* for a ſatisfaction of his injury; and he was no member of their houſe. This reſolution too, was not made as a foundation for any future bill, nor for articles of impeachment, but merely to damn an illegal and grievous warrant.

Such hath been the conduct and interpoſition of the Commons under the houſe of Stuart, both father and ſon, with reſpect to the law of this kingdom, when invaded by great officers of ſtate; and yet theſe were Princes who claimed a right of governing the kingdom, paramount the laws, *jure divino*; whereas it is the honour of his preſent Majeſty's family to derive their ſole title from the choice of the people, from an Engliſh act of parliament. There is not, therefore, the leaſt divinity that can now be poſſibly imparted from the throne to any of the preſent miniſtry; they are mere men and creatures of civil polity, and their actions may be judged by the common law of the land, without either blaſphemy, or any extraorninary or occaſional ſtatute for the purpoſe.

This being ſo, I am amazed that the Attorney ſhould think a bill neceſſary; becauſe, if there be no law now exiſting, that authorizes General Warrants in any caſe whatever, it really ſeems to be ridiculous to bring in a bill "to regulate what does not exiſt;" an argument, I find, which he affects not to comprehend, merely becauſe he is unable to anſwer it. "The Evil" is the practice or uſage which has grown of late, within the time of our fathers, in a clandeſtine office, contrary to the fundamental law of the land; and when this practice has been detected, the parliament need only damn it, and leave the

law

law as it was, without " the alteration even of an Iota in " matter or form." The Attorney, by an act of parliament, would, I perceive, fain make law of this modern uſage, under a pretence of bettering thereby the old common law; but, I fancy, he will find moſt people of opinion againſt him, and as much afraid of his coarſe hand as of his ſuperiors refinements, and, therefore, beg to have the law remain as it is. No act could poſſibly anſwer the end of a reſolution, unleſs it were, perhaps, a ſhort declaratory ſtatute of three lines, reciting that, " Whereas " a novel practice, had of late years gained footing in " ſeveral miniſterial offices, whereby General Warrants " for the apprehenſion of perſons under a general deſcrip- " tion, without naming any in certain, had been iſſued " from ſuch offices, contrary to *Magna Charta* ſo repeat- " edly confirmed, and to the immemorial and eſtabliſhed " rights of every Freeman, and to the known laws of the " realm; Therefore, by the direction and conſent of " King, Lords, and Commons, be it declared, That " ſuch practice is in all caſes illegal, repugnant to the " fundamental principles of the conſtitution, dangerous " to the liberties of the ſubject, and abſolutely unwar- " rantable."

Old Sir Edward Coke ſaid, with ſome humour, in Charles the Firſt's reign, at the head of the Commons in their conference with the Lords—— " For a Freeman to " be tenant at will of his liberty! I will never agree to " it: it is a tenure not to be found in all *Littleton*." " It " is (as he ſays in one of his treatiſes) a great deal better " for the ſtate, that a particular offender ſhould go unpu- " niſhed, on the one hand, or that a private perſon, or " public miniſter, ſhould be damnified on the other by " rigour of the law, than that a general rule of law " ſhould be broken, to the general trouble and prejudice " of many." Therefore, I beg leave to enter my proteſt againſt any bill, to regulate what I hope will never exiſt. The ancient Britons in a body, told Auguſtine himſelf, *ſe non poſſe abſq; ſuorum conſenſu & licentia priſcis abdicare moribus.* And, as to his preſent Majeſty, one may ſay, in the words of the famous Serjeant Glanville, (ſince I am in the humour of quoting) " There is no fear " of truſting him with any thing but ill counſel againſt " the

" the ſubject;" for, when once he is truly informed what his people's *priſci mores* or Common law is, he will never countenance any officer in abdicating them *abſq; conſenſu et licentia ſuorum.*

I can aſſure the Attorney, that I have, according to his directions, " ſeriouſly attended to his arguments." However, I very much doubt, whether the Miniſtry will pardon him for obtruding his private reaſons as thoſe which weighed with them, to put off the determination of the queſtion. Indeed, if any of the arguments he has adduced on this head, were really of weight with them, I ſhould think it muſt be that which he grounds on the impracticability of *pleading*, with effect, ſuch a reſolution in any of the courts of judicature; for I ſincerely eſteem this to be by far the moſt ſatisfactory of all. I know, my Lord Coke does ſay very emphatically, that *the ſcience of beau pleader is the very heart-ſtring of the law.* It would therefore, I confeſs, be a lamentible thing to have the Crown-pleaders " *divided and confounded*" in this their nice and artificial department of the law. Conſidering the preſent knotty difficulties attending theſe gentlemen, to throw any additional rub or ſtumbling block in their way, would be unpardonable in any good humoured adminiſtration. I do not, however, pretend to form a determinate judgment of the miniſtry's reaſons for avoiding a reſolution, as I have not vanity enough to ſuppoſe I can fathom them. *Perhaps*, they might be ſomewhat preſſed in time, having other weighty affairs in hand, that the vulgar know nothing of, and therefore would not come to any deciſion of the point, ſeeing they could not give it the parade of a ſolemn diſcuſſion upon the report of a committee; or, they might oppoſe the reſolution, becauſe it was moved by the oppoſition, reſolving withall to reſume it themſelves the very next ſeſſion; which laſt, indeed, I am very apt to think *may* be the caſe; or, peradventure, there might be other leſs oſtenſible and more predominant reaſons for their having ſo notoriouſly exerted the utmoſt of their ſtrength, merely to avoid the coming to any reſolution at all. They ſaid nothing inconſiſtent with any conduct; and, as many of their beſt friends voted againſt them, it cannot be ſuppoſed they would run ſo much riſk, without ſome very extraordinary

reaſons for ſo doing. It would not, however, be diſagreeable to the public, to know from the pen of a miniſter, eſpecially, from one of them that declines no labour, and has been a practiſing lawyer himſelf, what really were the arguments that ſwayed him to be for an abſolute adjournment of this queſtion, when ſo many people were of opinion it would have been more for his intereſt to have taken the popular ſide, and agreed to the reſolution, if not as firſt moved, at leaſt, as finally mended, narrowed and particularized by his learned co-adjutors. Such information would be much more acceptable, than the little ſcraps of politics and intelligence, which one now and then finds in the *Daily Gazetteer*, and which the common reader, upon the very firſt view, attributes to Jemmy Twitcher, (or his ſecond, Dr. Shebbeare,) who, I preſume, is not of the Houſe of Commons, and is, perhaps, ſome man that is too much unacquainted with law, and of too little gravity to be equal to ſuch a performance, and therefore, contents himſelf with doing buſineſs in another way, and only now and then writes off a ſquib, *upon his knee*, for one of the daily papers, as any matter happens to ſtrike him, at home, in the coffee-houſe, or at the tavern; in company with his wife and family, his miſtreſs and girls of the town, with miniſters of ſtate, gentlemen of fun, bawdry and blaſphemy, or ſingers of catches. Altho', I know it is the opinion of ſome people, that any thing will do for the public (poor John Trot.)

The Attorney ſeems to think, he has ſo ſufficiently defended the Majority, that he may ſwagger a little, and therefore aſks, Is this all that you have to complain of? I really thought you could have made out a more moving tale! What is capable of moving him, I know not; but I can aſſure him, that people in general, think the plain ſtory ſo bad, it is not well capable of being exceeded: and, all he has convinced me of, is, that there is nothing ſo bad, but ſome man or other, for the preſent penny, may be found hardy enough to undertake either the execution or the defence of. When I hear a man call an actual arreſt of a member of parliament, on the mere charge of a libel *ex officio*, and the ſeizure of his papers, "a phantom of imagination;" and remember to have heard the ſame man declare at his outſet upon this queſtion to a very

very great assembly, "that he had long been a member of "it, but had rarely attended, because he did not think "it *worth* his while before, having more valuable business "elsewhere;" and recollect scarcely ever to have seen him in that assembly, or at least to take any part in it, except when the confirmation of "another pillar of the "constitution, the Habeas Corpus law," was in agitation, by virtue of a *bill* too (the mode that he now seems fond of and that he then gave an earnest of his patriotism by being the champion of the opposition to it, insomuch, that he rouzed the indignation of the Great Man of the age (then a minister) who could not forbear starting up and reading to him, upon the spot, the resolutions of the ever-memorable parliament of Charles the First, on behalf of the rights and liberties of Englishmen, being therein supported with great eloquence and strength of argument by the then Attorney General; another great lawyer, and a particular friend of this last gentleman's, having indeed been the occasion of the bill: when all this, I say, presents itself to my mind, I want nothing more for forming a decisive opinion of the Attorney as a public man. By calling him the Champion, I do not mean to forget, that a certain candid lawyer united his best endeavours to strangle this Habeas Corpus bill; but then, he did it in so delicate and qualified a manner, that surely he cannot expect to have *his* pass for a first-rate part upon the occasion, no more than on another, when he gave up (from complaisance, I presume) an opinion that he had drawn and signed relative to a prosecution, and submitted to concur in that of an over-bearing collegue, who, tho' a subordinate co-adjutor in rank, by the boldness of his temper, took the lead in the matter.

I cannot help here remarking, that tickliſh times, or political struggles, always bring to light the real abilities of men, and let one see whether a man owes his reputation and rank to family, learning, and an attention to please, or to real great parts, a sound judgment, and true noble spirit. People of the latter class, become for ever more considerable by opposition; whereas the former, by degrees, sink to common men in it, and should therefore never quit for one moment a court, or, if by connection and chance they are obliged so to do, should return to it again as fast as they can.

Being one of thoſe men who think that "The heart-"blood of the commonwealth receives life from the pri-"vilege of the Houſe of Commons," that is, in all matters where a diſpute is likely to lie between the crown and the people, I cannot help noticing any the leaſt incident, that ſeems to me to break in upon it at all, and endeavouring from the conduct of men, even in ſuch little matters, to find out a clue that may unravel their diſpoſition in concerns of much greater moment, not judging of politicians in the leaſt, from the profeſſions they make, but from their actions, as the genuine expoſitor of their ſoul. I have likewiſe remarked, that univerſal civility and a ſmiling countenance, do not neceſſarily imply friendſhip and ſincerity, or candid diſcourſe a real diſintereſtedneſs. And no Doctor, however learned in civil life or the morals of Epicurus, ſhall negociate me into another opinion. But, by privilege of parliament, I do not mean that ſhameful exemption from private arreſts, which ſeems to me to operate againſt liberty intirely, and to render a Houſe of Commons no other than an aſylumin for needy debtors; who, you may be ſure, when once they are elected, like all other people in worldly diſtreſs, both will and muſt do any thing for ready pay. Although one of this deſcription may be aſhamed to look mankind in general in the face, yet upon any call of a puſhed miniſter, he will contrive to ſkulk down to the Lobby, and be ſure ſo to diſpoſe of himſelf, as to be able to come forth, whenever the diviſion takes place, and then, perhaps, diſappear till a ſecond call of conſequence ſhall render his appearance of ſome worth again. I ſpeak alone in ſupport of privilege againſt the power of the crown. Now, I remember being in company not long ago with ſome lawyers, who were talking over ſome late events relative to Mr. Wilkes, occaſioned by his having a deſign to lay hold of the firſt moment for ſtirring a complaint of a breach of privilege in his own perſon, and the Chancellor of the Exchequer's having likewiſe a meſſage from the King to communicate to the Houſe concerning privilege; and that upon this one of my companions declared, according to his ſentiments, there could be no doubt which would be intitled to preference or precedence, if it were only from a motive of reſpect. A great commoner immediately ſaid, "this matter can admit of no diſpute, and I "fancy

" fancy I don't hear well; the exiſtence of the freedom " of a Houſe of Commons depends upon privilege: a " meſſage from the King of a breach of Privilege! " Strange words! It cannot be ſo; it may be of ſome- " what relating to Privilege." A Gentleman in the company thereupon bethought himſelf of ſaying it was uſual, in order to give a certain commencement to a ſeſſion, to read a bill; and that for this reaſon, the Clerk always prepared one accordingly. This gave room for a complaiſant lawyer immediately to throw in, that this was certainly neceſſary, as all acts of parliament, having no certain day named therein, were in force from the beginning of the Seſſion, and that my Lord Coke had ſaid ſo. The reſpect of us all for this conciliating Gentleman's opinion, at that time, made us acquieſce in what he ſaid. However, I then thought it a very ſtrange reaſon, and ſince, upon inquiry, find there is no foundation for it, altho', I ſuppoſe the candid gentleman really thought there was, when he ſaid ſo, and that he did not drop ſuch words in a free company like ours, merely with an intention of having them reported to his advantage in one particular place. But, if he did, as it was a mixed company, and no ſecrecy neceſſary, I have a right to tell the world the ſtory; and yet I wiſh, with all my heart, that his civility may not be thrown away, nor the courtlineſs of his diſpoſition long lie unheeded. As to the thing itſelf, it muſt ſtrike any plain man that the beginning of a ſeſſion becomes as certain and notorious from the King's coming to the Houſe, ſending for his Commons, and his ſpeech, which all appear in the printed proceedings of the Commons, with the day prefixed in latin, as it is poſſible. This is ſomething real; whereas the bill prepared by the Clerk is nothing, for it is never paſſed into an act, nor heard of afterwards; and it is only made uſe of as a mere type or ſymbol, to keep alive the right which the Commons claim of going upon their own buſineſs before they go upon that which is pointed out to them by the King in his ſpeech, having in fact generally none of their own that is ready time enough for the purpoſe. Now, nothing in the world could have been a ſtronger proof of the exerciſe of this right, than the giving a preference to the complaint of their own member to a meſſage from the Crown; whereas, nothing could ſeemingly invalidate this right more than the proceeding upon the royal matter before that of their member, and

eſpe-

eſpecially, if there ſhould be not only a doubt, but a certainty, that his was firſt moved. Upon the principle that privilege is to take place of every thing elſe, nothing is of ſo much conſequence to the community, as the relief of its repreſentatives, from an unjuſt violence; they cannot do their duty as a parliament without it; for the parliament cannot be free, every county, city and borough cannot have its deputy preſent without it; and for this reaſon one would imagine this ſhould be their firſt buſineſs, which being printed and appearing in the votes, would render the commencement of the ſeſſion as remarkable and certain, as the reading of any bill whatever. With reſpect to my Lord Coke, I have a notion he ſays only, that "when a parliament is called and does not ſit, and is "diſſolved without any act of parliament paſſed or judg- "ment given, it is no ſeſſion of parliament, but a con- "vention;" wherein is not one word touching the neceſſity of reading a bill to give a certain commencement to a ſeſſion, and, indeed, I think he could never ſay ſo ſilly a thing; for I do not ſee how That marks a commencement more than any motion made or reſolution come to; and if the paſſage above quoted be what is meant, it is of a caſe which does not at all apply to the preſent queſtion, becauſe it ſuppoſes a caſe where no act at all is paſſed or judgment given; and no man on this ſide of St. George's channel thinks of inquiring after the commencement of an act that never exiſted, as a matter neceſſary for the courts of Juſtice to know. Moreover, the title of all acts printed, expreſſes the time of the commencement of the ſeſſion when they paſſed. But, I have frequently remarked, that where a deſire of pleaſing others, operates more ſtrongly than the deſire of doing what is right, men even of decency and circumſpection will ſlip into ſtrange abſurdies now and then. They will betray the true bottom of their conduct, when they leaſt intend it. No training or education will enable a little mind intirely to hide its littleneſs from the eye of an attentive obſerver.

In ſhort, a man may advance ſuch a poſition, by way of compliment, altho' it be ſomewhat at the expence of his underſtanding or his ſincerity; and it would not be worthy any ſerious attention, where it not a little characteriſtic, not only of the perſon, but of the times, when ſuch things can paſs for reaſons. Too much reſpect cannot be ſhewn to the Crown by any man, as an individual; but,

but, it ill ſuits with the duty of repreſentatives of the people to be ſwayed, by any motives of perſonal reſpect, to part with a jot of their own independency and dignity, in their corporate capacity. In truth, I ſuppoſe, no inſtance of the kind ever happened in our Houſe of Commons, or ever will. I do not, however, mean to ſay, that men who advance ſuch doctrines may not be of uſe about a Court; but, being formed in a prerogative mould, they can never be brought to act fairly by the people, let the ground be ever ſo good; for they cannot find in their hearts to ſpeak what may be capable of the leaſt interpretation to their diſadvantage, and every now and then will drop ſuch expreſſions of candor and moderation, and ſo qualify what they ſay, for the ſake of being civilly reported elſewhere, that they enervate all oppoſition, and by their ſuppleneſs frequently loſe ſome great point of liberty, that might otherwiſe be obtained for the public. Being an old fellow, and recalling to mind the otherguiſe ſpirits that ſtruggled firſt for an excluſion bill, and when that proved impracticable, ſtill went on, and, at laſt, brought about the glorious revolution; I fancy I hear old Britannia call out to theſe tame, temporizing ſpirits, theſe ſcholars of mere worldly caution and œconomy, theſe Hanoverian tories: You do me more harm than good upon every real trial; your parts are not extraordinary, nor your learning ſingular; your ſpeech is long, but neither forcible or perſuaſive, and you have not a grain of true patriotic reſolution: "Law in ſuch mouths is, in fact, like a ſword in "the hand of a lady, the ſword *may* be there, but, when "it comes to cut, it is perfectly aukwark and uſeleſs;" depart in peace, leave me to myſelf, and return from whence you came; I never aſked your aſſiſtance, and had been better without it,

Non tali auxilio, nec defenſoribus iſtis
Tempus eget.

A man may in truth, write moderately and meritoriouſly, in behalf of the government, enforcing new laws of forfeiture on the ſubject, who never will, no more than any of his name, ſummon up ſpirit enough to ſpeak plainly and boldly, at the hazard of his intereſt, let liberty in general be ever ſo much concerned, or his own fortune be ever ſo great, or his expectancies ever ſo vaſt.

There

There is of late ſuch a lack of what are called public men, that I am perſuaded there are many gentlemen who would deem Locke on government a libel, were it now publiſhed for the firſt time, inſtead of being reprinted. The Tory doctrines ſeem to be eſtabliſhing themſelves every day; and Tories ſpring up every hour, like toadſtools in the root of an old oak, that is ſprinkled by accident with a little water. I remember to have heard a Scotch Lord, who piques himſelf too upon law, and who had a brother that was high in the profeſſion, declare, before a great aſſembly, that His Majeſty held his crown as free as any of his anceſtors; for every body knew that the laws paſſed at the revolution, were the acts of heat and violence, and party, and to be regarded accordingly. Whereas, if theſe acts were once ſet aſide, and thoſe paſſed in conſequence of them, His Majeſty would have no title at all to the throne that he now fills, ſo much for the benefit of us all. I really ſhall not wonder in a little time, to hear hereditary right talked of again, and then it is but one ſtep more to the old doctrine of *jus divinum*, and paſſive obedience. Now, I chuſe to have his Majeſty's throne remain fixed upon its only ſolid or durable foundation, an act of parliament. I deſire to ſteer through the temperate and eaſy channel of a legal conſtitution, and a limited monarchy; without being demoliſhed on one ſide by arbitrary prerogative, or perpetually agitated on the other by the tumult and faction of a popular and republican ſtate. I am jealous, I confeſs, of all innovations, and heartily wiſh the preſent conſtitution may laſt; without going ſo far as a late great financier, who is reported in his very laſt moments to have ſaid, "for God's ſake let my ſon "have a tutor who is a gentleman and a ſcholar, and "above all things a true Whig: This poor country, I am "afraid, will be over-run with Tories, Scotſmen and "Jacobites." Now, altho' I am perſuaded that gentlemen of the laſt deſcription, ſhould they change their idol, yet will never quit idolatory itſelf, but transfer their proſtrate worſhip, and implicit adoration, to the golden image they adopt; yet I fear them not, in this kingdom, at leaſt, under the preſent Sovereign, who is by all men moſt juſtly eſteemed for the excellence both of his public and private character in war and peace. He does not wiſh to have his ſubjects addreſs him, in the language of Divinity, as *moſt adorable*, or to have them vow a *whole life of devotion* to him.

Of

Of this, however, I think every Engliſhman may be aſſured, that the two real pillars of our conſtitution are Parliaments and Juries, and that, in order to be what they ought to be, the former muſt be independent of the Crown, and the latter of the Judges, let the privileges be what they will that are requiſite for this.

With reſpect to men, I have as bad an opinion of many that are out, as any body can have of the motly actors that are in; but whenever the Crown-patentee, or Maſter of the Theatre, ſhall ſubſtitute other performers, I hope ſome diſintereſted men will lay hold of the occaſion for making ſome reſolutions, and perhaps ſome laws, that will be a ſecurity upon record for men much younger than myſelf, and for all our poſterity. I have thrown out my looſe thoughts from a true conſtitutional regard for his Majeſty, whoſe crown can never ſit eaſy when his people are diſcontented; and if, where all men allow the grievance, no remedy is applied, I am really afraid that the time may come, which a great orator once painted, when his Majeſty will not be able to ſleep at St. James's for the cries of his injured people. I proteſt that my neighbours every now and then come about me, knowing I was once of the law, to aſk what next will be done? Is it true, Sir, that ſuch a thing has happened, and that they intend to do ſo and ſo? What is practiſed againſt Wilkes (a ſad debauched dog that uſed his wife ill 'tis true) may be practiſed againſt us? Pray, Sir, what advantage is there that art, treachery or power could either invent, purchaſe or command, which has not been ſtrained to the utmoſt, in order, as it ſeems, to compaſs indeciſion only, and that in a very plain matter, of univerſal conſequence? We none of us now know any more of the law about libels, warrants and commitments, than we did before; one man ſays one thing, and another man ſays another; and as to the letters in the Gazetteer, *pro* and *con*, we can neither make head or tail of them; there is ſo much ſaid on both ſides, and ſo many diſtinctions made, that we are never the wiſer for what we read; if we could ſee but a ſhort reſolution in the printed votes of Parliament, we ſhould all of us know what to think upon the ſubject; but great men are taken up with their party diſputes, and never conſider us common tradeſmen and inferior gentry at all. To which I can only ſay, that they muſt not ſo ſoon loſe their patience; every thing, I make no doubt, will be properly ſettl d

by and by, (even the High Stewardſhip of Cambridge.) I have heard that the Attorney General ſhould ſay, he was in hopes of having a ſolemn determination, not long firſt, upon theſe very points in ſome of the great courts of law, perhaps from Lord Mansfield; and that I thought it was very probable the Parliament would reſume the conſideration of the ſame matter, and come to ſome ſatisfactory reſolution thereupon; that the Miniſtry oppoſed ſuch a reſolution the laſt ſeſſion, becauſe, perhaps, they might be glad to have a little more time to underſtand the matter; they might not, perchance, be men of very ready parts or quick genius, and they were too honeſt to decide any thing before they underſtood it; and that their having voted for the putting it off merely for four months, had the appearance of the utmoſt moderation; they had, beſides, many weighty affairs in hand, and might poſſibly be a little prolix in their nature; but I was ſure they meant well, and had great reaſon to believe that they thought as the reſt of the world did: in ſhort, that there was no room yet for people murmuring, it was not quite two years ago ſince the principal affair had happened, which was nothing at all in matters of law.

The Attorney, indeed, gives another turn to the matter, but I had not read his pamphlet when I made this anſwer to my neighbours. He ſays, that he really does not think the matter of much conſequence; he allows the people, in general, were very uneaſy and alarmed; but then he declares, that, till he had informed himſelf better, he "expected to hear a regular ſyſtem laid open, by which an "arbitrary adminiſtration had endeavoured to overthrow "the bulwark of our liberties, that the *privileges of Parliament* had been daringly violated; that ſome *innovations* had been attempted to annihilate *Magna Charta*, "the *Habeas Corpus*, or ſome other pillar of the conſtitution; in ſhort, that *ſome man* had been oppreſſed by "arbitrary violence, tyranny, and perſecution." (His expreſſion indeed is, *innocent* man, but I have left out that word as perfectly unneceſſary, becauſe a guilty man in this country is not to be knocked on the head, or tumbled into the river in a ſack, before he be proved guilty by due courſe of law, and *then* he is only to be executed as the judgment of the law ſhall direct; for, the putting of any one to death, without the intervention or ſanction of law, will be, at any time, and in any man who does it, *tyranny* arbi-

arbitrary *violence*, and murder.) Now, I need ſay nothing more to the Attorney upon the caſe of the man he points to, than I have done already, but, as to the other parts of law which he mentions, I will very frankly avow to him, that I think them very capital rights of an Engliſhman; and he may ſee that I have treated them as ſuch, and conſidered them as very materially intereſted, even in the caſe of the very man we have been converſing about. However, to oblige him, I will tell him ſome few of my thoughts upon theſe points, for him to think of by himſelf, or, if he pleaſes, to talk over with his ſuperior; altho'. I ſhall only touch them ſlightly in paſſing, and not launch out into all that the ſubject or the times ſuggeſt to my mind.

I have ever regarded the Habeas Corpus, both at Common law and under the act of Charles the Second, as the great remedial writs for the delivery of a freeman from unjuſt impriſonment, either by private violences or public tyranny, and even from juſt impriſonment in every bailable caſe. For which reaſon, I hope never to ſee ſuch a writ trifled with; and that if any lawyer ſhould adviſe any officer of ſtate to make a fallacious and inadequate return, by ſaying *the priſoner was not in his cuſtody*, when in truth he had been ſeized by his order, and in his hands, and was but juſt gone from thence, by *his* having ſent him to *cloſe* confinement, where no perſon could afterwards poſſibly get at him, in order to ground an application for a ſecond Habeas Corpus; I ſhould hope to ſee the vengeance of parliament, ſo ſoon as the fact was known, lay hold of ſuch lawyer, and, by its order, commit his body to the ſame ſort of durance, and then come to a reſolution, that ſuch return was a deliberate mockery of juſtice, and a moſt audacious perverſion of the great law of Habeas Corpus, and make the ſame the ground-work for a new declaratory and explanatory act, compelling the man who was ſerved with the writ, to ſet forth what he had done with a priſoner, or what was become of him, if he had at any time been in his cuſtody, and happened not to be ſo at the time that the writ was ſerved upon him; and likewiſe compelling a Judge (as ſome ſort of remedy againſt *cloſe* confinement) to award a Habeas Corpus upon the ſuggeſtion or motion of any man, who ſhould only ſay, that he believed his friend might be ſhut up in ſuch a place, and that it was impoſſible for him to have admiſſion to aſcertain the fact himſelf. Indeed, it ſtrikes me that

ſuch a return as that before ſtated, is falſe and untrue, becauſe, whether I keep a man myſelf, or ſend him to any other perſon to keep, the Law muſt conſider him as ſtill in my cuſtody, *qui facit per alterum, facit per ſe.*

I hope we ſhall never ſee any Chief Juſtice, eſpecially in that great Court of criminal proceſs, the *King's Bench*, who ſhall deny, or delay, the iſſuing one of theſe writs to any man who applies for it, being a writ of right to which the ſubject is intitled for aſking, without any affidavit whatſoever. In many caſes, as, for example, in that of *cloſe* confinement, it may be impoſſible for the party either to ſpeak to a friend, ſend a letter, or make an affidavit, and conſequently, if either be required by the court, it will be a virtual denial of the writ, and a means of defeating the Habeas Corpus act. The requiſition of an affidavit puts it likewiſe in the power of a Judge to object to its form or contents, and to ſay the ſame is not full enough; and yet, before another can be had, the party guilty of the violence, upon being apprized of what has paſſed, may, by means of this delay, remove the priſoner to ſome other place, or ſhuffle him into ſome other hands, nay, hurry him into a ſhip and carry him to the Eaſt or Weſt Indies, and then all attempt for redreſs will come too late, and be in vain. An application to the King's Bench for an Habeas Corpus in term-time, uſed to be eſteemed, I remember, a mere motion of courſe. "Our "inheritance is right of proceſs of the law, as well as in "judgment of the law."

It would, however, be more injurious to liberty, to have any Chief Juſtice, contrary to the practice of his predeceſſors, narrow the great remedial act of Charles the 2d, to the ſingle caſe of a commitment to priſon, or reſtraint by a legal officer, for criminal or ſuppoſed criminal matter; ſo that if I was reſtrained of my liberty, without the charge of any crime, by a man not pretending any authority of law for what he did, I ſhould be without any immediate redreſs, if ſuch reſtraint happened in the vacation time. As for inſtance, if I was taken up by a Serjeant of the Guards with a file of ſoldiers, on a verbal order from a Lord, Groom or Page of the Bed-chamber, without any cauſe aſſigned, and hurried away to the Savoy, or to a ſhip at the Nore.

The condition of the ſubject would be ſtill worſe, if any Chief Juſtice, inſtead of granting the writ prayed for,

for, ſhould force the party into the taking of a rule upon the impriſoner, to ſhew cauſe why he detained the perſon impriſoned; and this laſt miſerable remedy would ſtill be rendered leſs adequate, if the perſon applying was obliged to give notice of ſuch rule to the Solicitor of the Treaſury, as well as to the perſon in whoſe cuſtody he was, and alſo to thoſe who put him there; and even this again would be ſtill made more grievous, tedious and precarious, if the Judge ſhould be critical upon the affidavits of the ſervice of notice, and be extremely rigid in its being moſt punctually ſet forth, in every the minuteſt circumſtance. What a noble field for delay, evaſion and final diſappointment, would this open to every committer of violence; and how eaſy would it be, in the mean time, to dodge the man impriſoned from place to place, and from hand to hand, ſo as to render it utterly impracticable for any friend to procure his enlargement. A bold and daring miniſter, might thus eaſily tranſport a troubleſome prating fellow, to either India, long before any cauſe could be ſhewn upon ſuch a rule. I am informed, that a freeholder, preſſed for a ſoldier under a temporary act of parliament, was two years obtaining his liberty under one of theſe rules; altho' he did his utmoſt by money and counſel during all the time, to puſh on the hearing of his caſe upon the merits: Indeed, he had the great good fortune not to have his regiment removed farther than from Falmouth to Carliſle, in the whole time; for, had it been ordered abroad, I do not ſee how he could have had any relief, until the end of the war, before which he might have died of diſeaſes, or been knocked on the head by the enemy.

But it would be even ſtill much worſe, if any Judge ſhould abſolutely refuſe to grant an *attachment* for diſobedience to a writ of Habeas Corpus iſſued in the vacation, in lieu thereof direct another writ to be taken out, and ſhould entertain doubts for weeks together, that a Peer was privileged from being attached by the *King's-Bench* for diſobeying their writ, treating the court with opprobious language, and threatening to ſhoot the perſon who executed it, if he did not withdraw from his preſence; "let the Judges touch him if they dare, perhaps he "might by and bye write a *letter* to them?" and if the Houſe of Lords ſhould be acquainted thereof, and intirely renounce any claim to privilege in ſuch caſe, the ſame

Judge

Judge ſhould only then order a third writ of Habeas Corpus to be taken out, and with very great difficulty be prevailed upon to let an attachment accompany That, and not without giving particular directions, that ſuch attachment ſhould not be executed until every other means of obtaining a compliance with the ſaid third writ proved ineffectual, for the court would take notice of the perſon who ſhould otherways preſume ſo to do; declaring withall, that the only reaſon for granting the attachment even then was, the near expiration of the term and the want of authority in a Judge to award any in the vacation, and therefore it was neceſſary to enforce this writ by a more expeditious method than *Habeas Corpus*, before the ſtatute uſed to be, or than the words of the ſtatute itſelf *ſeemed* to require.

What would the Attorney ſay, if any Chief Juſtice in concert with an Attorney General, at the requeſt of a foreign Embaſſador, ſhould ſend a verbal order for detaining a man twenty-four hours, and for ſeizing his papers, becauſe he was printing ſomething which his Excellency did not like; and there ſhould never afterwards be any warrant granted, information filed, or proſecution intended; the ſole end of the Embaſſador being anſwered by getting poſſeſſion of the papers?

Or, if the legiſlature, after a violent oppoſition in the Commons had paſſed an ariſtocratical act, to prevent unequal matches, that is, to hinder property as much as poſſible from diffuſing, by rendering all marriage between people under age impracticable, unleſs upon certain conditions; contrary to the principles of love, liberty, population and commerce, which all require, that as little reſtraint ſhould be laid upon matrimonial connections or property as poſſible; a Chief Juſtice was to endeavour to carry ſuch act farther than the legiſlature had done, and to extend its regulations to a country not named within it, to the diſquiet of many people who had fled thither for the beneficial purpoſe of lawful marriage, according to their own inclinations; by throwing out his ſentiments from the bench, in diſfavour of the validity of ſuch marriages, extrajudicially, no match celebrated in that way having ever come in judgment before him?

Or, if any foreign ſoldier in this kingdom ſhould be committed for felony, a lawyer in the ſervice of the crown ſhould be conſulted thereupon, and he ſhould adviſe a Secretary of State that he might, by letter in his Majeſty's name,

name, lawfully order the Mayor of the town, in whoſe priſon ſuch felon was, to diſcharge him without bail or mainprize, or even the conſent or knowledge of the proſecutor, in order to prevent thereby the ſoldier from being tried by our laws for ſuch felony?

What would the Attorney ſay if any Chief Juſtice, contrary to the uſage of Judges, who are to have no ears for any thing that is to come in judgment before them, until the ſame is brought on judicially, ſhould, weeks before any *crown trial*, officiouſly ſend for the proceedings, to ſee whether they were legal, and, upon diſcovering an error on the proſecutor's ſide, ſhould ſummon to his chambers the Attorney of the other ſide, and tell him he muſt conſent to the ſetting right of this error, to the end that the *tenor* of the pleading might be ſuch as judgment could be pronounced upon; and, notwithſtanding the Attorney ſhould proteſt he could not conſent thereto upon the account of his client, and that the ſame was a *criminal* proſecution, and that ſuch alteration of the record was not warranted by any adjudged precedent; ſhould nevertheleſs arbitrarily direct it to be done, without either having the point debated before himſelf by council, or brought on before the whole court for their opinion; and that the defendant, being found guilty by the Jury, ſhould be deprived, by ſuch amendment, of taking advantage of the error aforeſaid, in arreſt of judgment, which he might otherwiſe have done, and the ſame would have been fatal to the proſecutor?

Or, if any Chief Juſtice, notwithſtanding the maxim forementioned, ſhould make it a practice to ſpeak with parties and to ſend for Attornies, and talk to them privately about their cauſes, and even read the briefs in them, in order to ſee ſuch ſecrets of cauſes as are only confided to council to be managed as they ſhall think proper, and by that means ſhould frequently come into the court with a bias upon his mind?

Or, if a Chief Juſtice ſhould tell a Secretary of State, for him to tell a foreign Miniſter, that he need not be uneaſy about ſuch a particular man, for the term would come within three weeks, and that then *he* ſhould be able to give judgment againſt the man (a libeller convict) and that *he* intended to ſet a fine of 500 l. upon him, and to ſentence him to two years impriſonment beſides, if he did not make off; and that if he did, there would then be a riddance of him that way; ſo that his Excellency might be perfectly eaſy about him in all events?

Or,

Or, if any Chief Juſtice, upon the affidavit of an unlicenſed Ale-houſe Keeper ſupported by a great Tory family, ſhould entertain a complaint, accompanied with no imputation of corruption, againſt a Juſtice of Peace, who had acted upon a matter within his juriſdiction, and had only exerciſed that diſcretion which an act of parliament gave him, and where his power was ſummary and final; and ſhould at firſt threaten a rule for ſhewing cauſe why an Information ſhould not be awarded againſt ſuch Juſtice of Peace, and ſhould at laſt make a rule upon him to ſet forth his reaſons for not granting a licence, by way of terror, to hang over his head until the next licenſing time ſhould come round?

Or, if any Chief Juſtice, with a view to the introducing a ſpirit of arbitrary and diſcretionary determination in courts of law, under a ſpecious pretence of equity, ſhould from the ſeat of juſtice declare he deſired to hear of no caſe that was determined above 50 years ago?

Or, if any Chief Juſtice ſhould, by ſolemn but unneceſſary givings out from the Bench, endeavour to blaſt the repute of Juries with mankind, by pronouncing that the trial by jury would be the very worſt of all, were it not for the controuling power of judges, by the award of new trials and the reconſideration of verdicts, and that, indeed, it could never have ſubſiſted had it not been for ſuch controul, by reaſon of the want of capacity in jurors, and the changes of the times?

Or, if any Chief Juſtice ſhould arbitrarily order a Juror to be ſet aſide, without any cauſe of challenge, and forbid his being ever put upon another panel, only becauſe ſuch Juror had withſtood his directory opinion in a former trial upon a matter of fact, whereof, by his oath, he was to form his own judgment*?

Or, if any Chief Juſtice ſhould arrogate to himſelf at *Niſi Prius*, the ſeparate provinces of Judge, Council, and Jury, by cutting ſhort the one, and impoſing his own ſenſe of things upon the other, and, if upon any occaſion a verdict contrary thereto was perſiſted in to the laſt, ſhould imperiouſly and unconſtitutionally demand of the jurors their reaſons for the ſame?

Or, if any Law-Privy-Counſellor ſhould, by way of introducing an arbitrary government in the plantations, lay it down to Counſel as a principle, that *Engliſh* ſettlers, by going from hence to people American colonies, thereby loſt

* In the reign of "*Alfred*, one Juſtice *Cadwine* was hanged, becauſe he "judged one Hackwy to death without the conſent of all the Jurors; for "whereas he ſtood upon his Jury of twelve men, becauſe three of them "would have ſaved him, this *Cadwine* removed theſe three, and put other "in their room on the Jury, againſt the ſaid Hackwy's conſent." *Horn's Mirror of Juſtices.*

the

the privileges of Engliſhmen, and the benefit of the *Engliſh* common law, and were to be governed ever after by the charter of the King, and by prerogative, without the intervention even of a *Britiſh* parliament, and that the board would judge them accordingly?

I ſay, if any of theſe things ſhould happen, I ſhould in my turn "be glad to know" what the *Attorney*, as a Lawyer, would ſay to them; I will tell him very fairly, that from ſuch premiſſes, I think, old as I am, I could draw up a ſtrong ſet of articles: for, what in a common man is a breach of the law, is alſo a breach of truſt in a Judge; and where he obſtructs juſtice and changes the law, it is treaſon at common law. It would, indeed, be very unhappy for the ſubjects of this country, if there were a man to whom any one of theſe things were applicable: and the Lord have mercy upon the nation, if a time ſhould ever come, when they ſhall all center in one and the ſame man. Being got thus far, I will aſk him, what opinion he would have of the veracity of a Judge, who, having tried an old gentleman for perjury, where there were four poſitive witneſſes for the proſecutor, to the words being ſpoken which were charged, and which were probable in the nature of the caſe, and four witneſſes for the defendant; in ſhort, his followers, who ſwore that they were very near their maſter, and muſt have heard the words, had they been ſpoken, and they heard them not; and that the Judge thereupon found it neceſſary to labour to the Jury the character and fortune of the defendant, and the utter improbability of his having denied upon oath, his having uttered the words, had he really uttered them; and that after a good deal of heſitation and doubt, the Jury at laſt acquitted the defendant: I ſay, after ſuch an acquittal, what would one think of a Judge, who ſhould, in a public aſſembly, wantonly and unneceſſarily mention this caſe, and declare there was not the leaſt colour or pretence for the proſecution? What the Attorney may ſay, I know not, but I am ſure, for my own part, I would never afterwards give ſuch Judge any credit for a fact he ſhould advance upon his own teſtimony only, however glad I might be to hear his reaſoning upon any ſubject whatever. For, ingenuity is one thing, and ſimple teſtimony another, and "plain truth *(I take it)* needs no flowers of ſpeech."

It is the preſervation of the conſtitution in its due order which muſt continue us freemen; nothing elſe can. And whilſt our laws continue unprofaned, lawyers will of courſe be conſiderable, their profeſſion honourable. But when civil liberty dies, by foreign or domeſtic invaſion, the vocation

of

of a lawyer will ſoon become equally mean among us, to what it actually is now in all foreign countries, where the monarch by the ſword and the army lays down his will for law, and breaks through the forms of courts and their rules of juſtice whenever he pleaſes. The true language in this country is that of a late famous miniſter, who ſaid he would have it be known throughout his Majeſty's dominions, that all men were ſtill to be ſubordinate to the civil power. For which reaſon no greater misfortune can befal a nation than to have a verſatile, temporizing, unprincipled Grand Juſticiary, nor any more general bleſſing than an able, uniform, firm and incorruptible Chief Juſtice. What therefore muſt be the weakneſs, or the thoughtleſſneſs of any miniſter, who ſhould endeavour, in public diſcourſe, to leſſen the reverence of every Engliſhman towards Judges in general, by treating the moſt ſolemn adjudication of a ſupreme court of law, delivered upon oath, as he would the profligate proceedings or abandoned votes of a motley crew of unſworn and ignorant election-men? or who ſhould wantonly, in a great and ceremonious aſſembly, ſtart a vulgar idea that tended to degrade any one of their judicial determinations to a level with the ſcoundrelly converſation of the liverymen of Peers? I will venture to ſay, that by debaſing the reverend Judges, you tend to raiſe a contempt for all civil government; and when the veneration for Judges and Laws ſhall once fall to the ground, neither Juries nor Parliaments will long ſurvive, but they will all be delivered up to the mere diſcretion of the Prince, who will ſoon find it much eaſier and ſhorter to govern by his own will and pleaſure, that is, by a privy council and a ſtanding army, and thus levy, without doubts or difficulties, whatever money, or execute whatever orders he ſhall in his wiſdom preſcribe. One principal drift, therefore, of this my letter, is to let mankind ſee from facts, who are, and who have been, when in power, in their ſeveral departments, the defenders of this noble and antient conſtitution, and who the perverters, violaters, and impugners, of the civil rights, laws and privileges, both of the people and their repreſentatives. The goodneſs of his preſent Majeſty will prevent any great exceſs in his time altho' the laws ſhould be ſo proſtrated, as to render it practicable without puniſhment; but, who can anſwer for his ſucceſſors? It will not be difficult, when once the law can be rendered ſubſervient to a Miniſtry, for any cunning Prince to find out a Solicitor for his Treaſury, an Attorney General for himſelf, and a Chief Juſtice for England, who ſhall deviſe means for grinding the face of the ſubjects, until they ſhall all be ground unto powder.

It

It is an inglorious, a diſheartening, and a diſadvantageous thing, to have a ſucceſsful war followed by an inadequate or inſecure peace; but the preſervation of conqueſts is note by any means, of ſo home a concern to any commonwealth, as the preſervation of its conſtitution. Breaches of the latter, are the moſt melancholly and fatal forerunners of abſolute ſlavery and ruin. And nothing can aggravate the miſery of ſuch a view, but to ſee the ſame men the invaders of domeſtic liberty, who have been the ceders of foreign acquiſitions.

The Attorney himſelf has forced me to theſe reflections, for he concludes with intimating that we are "threatened with evils, which our united ſtrength can "ſcarce avert;" by which he muſt mean another war. Now, if this be ſo, I am heartily ſorry for it, from the bottom of my ſoul, and do therefore moſt ſincerely concur with him in aſking —— "In this ſituation, is it a time "for private jealouſies and private intereſts to conſume "the interval that peace affords us! To ſow the ſeeds of "diffidence, to revive the diſtinctions of party, and wan"tonly to ſound the alarm of *privilege and prerogative?*" In my conſcience it is not, and what miniſters can mean by ſo doing, if they really intend the ſervice of their royal maſter, I cannot conceive. I vow to God I am aſtoniſhed at it.

Nor ſhould I have thought of ſaying one half ſo much upon the ſubjects of this letter, were it not to vindicate the laws and the conſtitution from the attack made upon both by *The Defence of the Majority*. The main intent of which is, "to alter and ſubvert the frame and fabric "of this Commonwealth, by endeavouring to perſuade "the conſcience of the ſubjects, that they are bound to "obey commands illegal."

I will now take a final leave of the Attorney, having had proof enough of his fairneſs in argument, and his modeſty in aſſertion; but, ſince he has talked ſo much of our diſtreſſed ſituation, both foreign and domeſtic, and of the Houſe of Commons, I will apply to the preſent ſubject, what a great man *, a Tory too, ſaid on another occaſion, with a change of three words only.

"*SIR*,

* Sir William Wyndham, father of the late E. of Egremont, and of Mrs. George Grenville, and Chancellor of the Exchequer for the Tories under Queen Anne. He was committed to the Tower for *high treaſon* in

" *SIR*, In all the variety of company I have kept, I have " never heard a ſingle man without doors pretend to juſtify " this meaſure; and when the ſentiments of particulars were " ſuch, I did not expect, when they were met together " in a body, to ſee a majority vote for it. This muſt be " owing to one of theſe cauſes: either gentlemen were " convinced by the arguments made uſe of in the Houſe " for juſtifying this meaſure, or there are other methods " of convincing beſides reaſon. I am not at liberty to " ſuppoſe it the latter, therefore I muſt ſuppoſe it the for- " mer. But this, Sir, is to me a very melancholly conſide- " ration; for, tho' I have attended with the utmoſt regard " to all that has been ſaid upon this meaſure, I have not " heard a ſingle argument in its favour, that has had the " leaſt weight with me. I muſt now conclude that I do " not underſtand reaſon when I hear it, therefore I am " reſolved to retire. However, I muſt beg gentlemen " to conſider the conſequences. This adjournment is in- " tended to convince mankind, that the meaſure now un- " der conſideration is a reaſonable and an honourable mea- " ſure for this nation; but if a majority of fourteen, in " ſuch a full Houſe, ſhould fail of that ſucceſs; if the " people ſhould not implicitly reſign their reaſon to a vote " of this Houſe, what will be the conſequence? Will " not the Parliament loſe its authority? Will it not be " thought that, even in Parliament, we are governed by " a faction? For my own part, I will trouble you no " more, but with theſe my laſt words, " I ſincerely pray " to Almighty God, who has ſo often wonderfully pro- " tected theſe kingdoms, that he will graciouſly continue " his protection over them, by preſerving us from that " impending danger which threatens the nation from " without, and likewiſe that impending danger which " threatens our conſtitution from within." I am, Sir,

Weſtminſter,
Oct. 17, 1764.

The FATHER of CANDOR,

Libertas & Natale Solum.

in 1715, and delivered under the Habeas Corpus Act in 1716; and his caſe under that ſtatute was the great caſe urged in favour of Mr. Wilkes, when brought up by Habeas Corpus to the Common Pleas, in order to be delivered from a commitment to the Tower, by his ſon, for a *libel*.

POSTSCRIPT.

I SHALL here, in very few lines, make ſome reply to the *Defender* in his Poſtſcript, and to a late *Conſiderer*, premiſing that I do not think a ſtater of facts, from whence a bad character iſſues, is a calumniator, but an hiſtorian; and ſincerely hoping (notwithſtanding the *Defender*'s threat) that no writing of mine will *give occaſion to the laſt dying ſpeech and confeſſion of the conſtitution* *, ſhould *he and his party* have any intention of giving the finiſhing ſtroke to it.

I will now aſk the *Defender*, whether the ſtar-chamber did not exiſt before the reign of Henry the 7th, altho' it were little reſorted to; and whether, before that time, it was not the King's attorney, or coroner, in the King's Bench (that is the maſter of the Crown office) who filed informations at diſcretion; and whether, That was not the grievance intended to be redreſſed by the ſtatute of William the 3d: and, after all, how the nature or oppreſſiveneſs of an attorney general's information is at all altered, or affected, by the diſputed period of its commencement?

He ſays, "The *nature* of libels may differ as much "as the complexions of the writers." This I do not comprehend. Individuals of the ſame ſpecies may differ in complexion, but not in nature or kind. A miſdemeanor is one diſtinct kind or head of crimes; libel is a ſpecies under it, and the particulars, or individuals of this ſpecies, may differ in ſome features from each other; but, being all of the ſame ſpecies, or claſs of crimes, they muſt partake of the ſame nature, or kind. They all iſſue from the ſame ſtock, altho' their learning, manners and merit, may be different.

I am equally at a loſs to underſtand, how he "maintains that compariſon of hands is *no* evidence of "hand-writing in a criminal caſe," and yet inſiſts, that it "has been always admitted there, as circumſtantial

* Defence of the Majority, 2d edit. p. 46, 7.

" and corroborative evidence." If it be no evidence, it cannot corroborate or authenticate. *Ex nihilo nil fit.*

He says, he " never met with an instance, where the " House of Commons have expounded a point of law " at that time pending in the courts below, by a mere " resolution or declaration, which might intimidate a " judge, or prejudice a jury in a cause actually before " them." I desire him to recollect, whether an information was not pending against Mr. Wilkes for being the author of a libel (the North Briton, No 45,) when the present House of Commons resolved the said paper to be a libel (which is a nice point of law in the notion of the *Defender* and *Considerer*) and then resolved Mr. Wilkes to be the author of it; and whether, afterwards the trial of this very information was not had, and Mr. Wilkes found guilty, by a judge and jury? The influence, however, of the said resolutions upon the judge or jury, I am not aware of.

* The *Considerer* stumbles in the very threshold, for he begins his *Considerations* with a misrepresentation of the point in dispute, by supposing the question to be upon the *propriety of a parliamentary regulation of the exercise of General Warrants*; whereas the question is, whether the House of Commons cannot with *propriety declare* them to be illegal. An act for regulating the exercise of them must suppose they are legal, the very thing that is denied, and which no man pretending to be a lawyer, before this author, ever affirmed. He says, " I have not

* I must tell the *Considerer*, in answer to his first note; the common opinion among lawyers has always been, that no judge, in a *criminal* proceeding, ought to know any thing of the record before the trial comes on, unless one of the parties *in open court* move something thereon; because a judge is to be unprejudiced and impartial. The making of an *immaterial* alteration in any chamber would be folly; the making of a *material* one *without consent*, seems to be injustice, seeing it might prevent and remove an objection, fatal after trial, in arrest of judgment. And, what Attorney in his senses would complain to any court against the president in it? I challenge this sophist to produce one *adjudged* precedent of such an alteration. His supposition of there being no difference in legal signification between the words *Tenor* and *Purport* is grounded in ignorance; the former having been *determined* to import an exact recital, and the other only the general meaning and effect, of any deed or paper. For which reason the first has been held to be sufficient, and the other insufficient, to ground a conviction,

" produced

" produced a ſingle legal authority in ſupport of the " illegality of general warrants," and therefore preſumes " that no authority whatſoever can be found for this " purpoſe." A ſufficient anſwer to this would be, that the very ſuppoſition is drawing into queſtion firſt principles, which men in a learned profeſſion, among each other, never dream of citing authorities for, ſuch elementary parts of ſcience being only proved by the teachers of Rudiments, or the writers of regular ſyſtems, who muſt both begin *ab ovo*. Nevertheleſs, let him look again, and he will find Lord C. J. Hale and Serjeant Hawkins cited, and not " the opinion of a preſent Chief Juſtice" (juſtly eſteemed of the greateſt weight, and founded on the moſt unqueſtionable principles of law, as it is; and called for, inſiſted upon, and reluctantly extorted, as it was, by the jury, who imagined it neceſſary to be known for regulating the *quantum* of the damages they ſhould give.) The citation, however, of authorities was in me a work of mere ſupererogation; becauſe it is a confeſſed maxim in law, that there muſt be abſolute certainly in all proceſs. Even in *civil* caſes this is required, where the name itſelf is neceſſary, and any miſtake in it is not endured. And yet the injury is not ſo great to the character of a man to be arreſted for a civil as for a *criminal* caſe, which carries ſo horrid an imputation with it.

The objection to the warrant ſo much complained of is, as the *Conſiderer* truly ſtates it, *on account of the general deſcription of the Offender*. But, if I underſtand him aright, he himſelf admits the propoſition, by contending in behalf of the warrant in queſtion, that it " contains a ſpecifick deſcription of a particular perſon; " that too, which of all others is ſolely and peculiarly " applicable to him, the commiſſion of the offence." For, a general deſcription is the reverſe of a *ſpecific* one, " ſolely and peculiarly applicable to one perſon", *quod convenit ſoli, non omni*.

Indeed the fallacy of the *Conſiderer* is notorious in this place; for, he firſt undertakes to prove the legality of general warrants, but then reaſons upon a warrant *containing a ſpecific deſcription of a particular perſon, ſolely and peculiarly applicable to him*, which is to all intents and purpoſes a ſpecial warrant, and comes within the alternative I mention, namely, that every warrant muſt expreſs

the name or a certain designation of the person, which last too, by the way, will afford room enough for the apprehension of any murderer, and prevent every possible failure of justice.

But, let me ask him, how *the commission of the offence specifies the person?* Somebody without doubt must commit the offence; but, how does a description of the offence describe that somebody? The gentleman has confounded himself between a specific description of the offence and of the offender. The warrant, it is true, contains a particular description of a certain paper, by setting forth its peculiar title, so as to point it out to every body at first sight; but, I will defy the *Considerer* to say that the general denomination of *Author*, *Printer or Publisher* makes known any one man or individual person whatever. A paper or book has its title printed in the title-page, and it goes every where by that title; but, no man walks about with the title of *Author*, *Printer or Publisher of the North Briton*, *No* 45, imprinted on his face, nor is that the way of fixing identity in men, this being done by the Christian and Surname, or by a delineation and minute designation of their person and features, &c. such as we see military officers describe their deserters by, or as Sir *John Fielding* uses for highwaymen.

The law, to warrant an apprehension, requires a certainty of the person as well as the crime, they must both be specified in the process, or the execution of it is illegal. It would otherwise be liable, from the generality of the description, to be executed upon wrong people, which the freedom of our constitution will not permit. There is nothing in the countenance of any man (of A more than of B or C) which can determine him to be or not to be the author, Printer or Publisher of any piece; so that many innocent men would be causelessly harrassed from vain, light surmises, and idle reports of ignorant, ill-informed or ill-intentioned people, were such general warrants received. Therefore some person in certain must be named, or by notorious and visible marks particularly pointed out.

Would any man of common sense say, that Sir *John Fielding* had issued a proper warrant for the seizure of any particular person, if he had granted a warrant for the apprehension of *the highwayman who robbed Mrs. C. between*

between London and Knightſbridge, at ſuch an hour and ſuch a night, of twenty guineas and her watch? What man could be legally ſtopped and taken up as within the deſcription and by virtue merely of ſuch a warrant? For, is not every man who has the uſe of his limbs able to rob? And yet, according to the ſhrewd *Conſiderer*, it *contains a ſpecifick deſcription of a particular perſon; that too, which of all others is ſolely and peculiarly applicable to him, the commiſſion of the offence.*

It is really abſurd to contend that by deſcribing the offence you deſcribe the offender; or that an officer has any certain ground to go upon in the execution of a warrant containing neither name, definition, nor portrait of any individual whatever.

Is it therefore to be wondered that in the caſe of Mr. Wilkes, under the general warrant then iſſued, many people were taken up, who were neither Author, Printer or Publiſher? For, is not every ſoul, woman as well as man, capable of publiſhing a libel? It is in truth ſo ſtrange and random a way of proceeding, and ſo productive of injuſtice, that one would think, after ſuch recent experience, our moſt *exotic* apprentices to the law would be ſenſible of it. They may be aſſured withal, that what is not agreable to common ſenſe, or is uncertain in itſelf, can never be rendered either plain or poſitive by any metaphyſical twiſt in talking or writing about it.

This refined writer, however, ſeems afterwards to unſay what he had before aſſerted, by conceding that *he by no means approves of general warrants where ſpecial can be of effect.* This ſurely is contradiſtinguiſhing General from Special warrants! wherefore I wiſh he had either ſhewn how a *ſpecific* differs from a *ſpecial* warrant; or elſe how a *general* warrant can be ſpecific, in one and the ſame ſenſe. The ſame warrant may be certainly ſpecific as to the crime, and yet general as to the perſon; but, unfortunately for this ſcribe (who ſeems to hold *the eel of ſcience by the tail*) *the Engliſh* law requires the ſpecification of both.

Furthermore, he is miſtaken in ſuppoſing I admit General Warrants to be legal in Treaſon; for, I condemn them expreſly in all caſes. Indeed, a little reflection

muſt

muſt convince any one of the neceſſity of a contrary doctrine.

A man to be apprehended at all muſt be guilty of ſome breach of the law; and this muſt either happen in the view of the magiſtrate, or be proved to him by oath, before he can iſſue a warrant for his arreſt. The proceſs muſt ſpecify both the offence and the offender. For, if this were not ſo, it would not be the magiſtrates, but their officers, who would adjudge what perſon ſhould be taken up. Now, the laſt are merely miniſterial and can only execute orders, which therefore muſt be preciſe. It is the province of the magiſtrate alone to judge, and no man can delegate his judicial capacity to another. But, if he grant a diſcretionary, that is, a general, and not a particular warrant, the officer is left to judge for himſelf. The law would therefore act vainly in requiring the magiſtrate to have information on oath (of good cauſe of ſuſpicion, at leaſt) againſt a *particular* perſon, before he iſſue any order for his caption; if his officer can take up *any* man he ſhall think fit by virtue of general words and his own diſcretion, the liberty of every *Engliſhman* would then be left at the mercy of every impudent Bailiff, Conſtable, Meſſenger, or Footman, intruſted with proceſs.

Even in *Hue and Cry*, where *freſh* purſuit is made, the felon muſt be deſcribed, and alſo the way he is gone.

Let me now ſuppoſe that *Leach* had defended himſelf and his houſe, and killed the Meſſenger. Would he, I deſire to know, have been guilty of murder; the warrant, that he was apprehended by, naming nobody, and he being no object of it, neither within the letter nor the ſpirit of it? On the other hand, had the Meſſenger killed *Leach*; would he not have been clearly guilty of murder?

A power of diſpenſing with the law and its forms of juſtice has I know been formerly claimed as a royal prerogative, but not even a *Civilian* I believe (of the moſt *northern* extraction) will venture to broach ſuch maxims now. It is indeed profligate nonſenſe to pretend, that what is contrary to the common and ſtatute law of this realm can be legal, let it be commanded by any other power whatever. There is no *law of government* beſide or paramount the laws of the land. In the time of Charles the firſt, upon the impriſonment of the members,

in

in the fourth year of his reign, Serj. *Ashley* (in his argument at the conference between both houses) asserted that *Lex Terræ* meant divers kinds of law, as the Common Law, the Ecclesiastical Law, the Admiralty Law, the Law of Merchants, the Martial *Law*, and *the Law of State*, and that by this last sort of law kings could imprison their subjects at their pleasure, without shewing the cause. But this the Serjeant's zeal for slavery offended in those days both the Lords and the Commons, and he was immediately ordered into custody for the unconstitutional doctrine he had advanced. However, upon his humble petition, submission, recognition of his fault (in arguing that a King of *England* could govern by *a Law of State*) and asking Pardon on his knees, he was at last discharged.

The hair drawn distinctions made use of to put a difference between Scrogg's and Lord Halifax's general warrants are unworthy any answer, and become only a sophist in his noviciate of logical disputations at College. And, the words *which should thereafter be published*, are not in one of the warrants cited by me. A circumstance immaterial in itself, were it not to shew the little trust that one ought to repose in this slippery writer's assertions or quotations.

The best way perhaps of answering a man who *reasons* that the *King's Bench* approve such warrants, because people have been there admitted to Bail under them, is to bring him to the *fact*, that is to the King's Bench itself, and then he will be convinced by his own ears and eyes, that the Court never examine the validity of any warrant, unless when called upon so to do.

The Considerer *knows*, it is seldom worth the while of any man who brings a Habeas Corpus, to question the legality of the form of the warrant for his caption, because a regular one would be issued immediately, and he must then be at the expence and trouble of being brought up again by another Habeas Corpus. What Council, therefore, would touch upon an objection of form, if he had nothing of substance to urge for his client's discharge? The best thing for him, is to be bailed as soon as possible. The *Considerer knows*, that neither court nor council would officiously act so nugatorily and unkindly. The only Chief Justice of our time, who has had a man

before

before him upon a general warrant (excepting the late caſe of Mr. Wilkes) is my Lord Mansfield. Dr. Shebbeare was apprehended by ſuch a warrant, and brought before his Lordſhip; but, he took no notice of the obvious defectiveneſs of the warrant, and admitted the Doctor to bail under it. And yet, I never met with any man, before the *Conſiderer*, who either blamed this conduct, or held ſuch general warrant to be legal. Rumour whiſpers, that in the caſe of Mr. Wilkes, the Secretary of State ſaid, "as we know him to be the author, why not "name him;" and that it was a noted Solicitor who prevented this being done, by telling his Lordſhip, "*it* "*was better not.*"

I leave the reader to judge, whether the *Reſolution* propoſed in Parliament did not ſpring out of an Inquiry into the conduct of Mr. Webb and Mr. Wood, and then deſire he will judge of the Candidneſs of the *Conſiderer*, who treats it merely as a ſpontaneous motion grounded on nothing. He need but read the Votes or Journals *. It is beneath any but a Schoolman, to waſte time

* Mr. Wilkes's caſe gave riſe to the meſſage and the complaint about privilege, and to a very long inquiry in parliament. From the matter then diſcloſed, the reſolution propoſed about general warrants in libel took its riſe, and it was framed according to the very words of the warrant that had been actually iſſued. At the opening of the motion, it was declared, frequently mentioned in the courſe of the debate, and fully underſtood by every body, that this reſolution was to be followed by another, declaring the execution of ſuch a warrant on a member to be a breach of privilege. (Indeed, that follows of courſe, for any arreſt, that in the caſe of a common man is illegal, in the caſe of a member is a breach of privilege.) In ſhort, the riſe, the progreſs, and the end of the whole was privilege, and yet this is the part which the ſhrewd *Conſiderer* particularly ſlights; becauſe (I ſuppoſe) he knows it proves irrefragably the propriety of the Commons interfering. For my own part, I did not mean to ranſack the journals for every reſolution appoſite to the caſe in queſtion, nor ſhall do it now; but, to ſingle out inſtances of the Houſes interpoſing in all kinds of caſes, to ſhew the general nature and extent of their proceeding. However I will venture to affirm, there are more than 20 independent reſolutions, to be met with in the journals, upon points of privilege and of law, unattended with any ſubſequent impeachment, bill, addreſs, or order. Nay, is it not ridiculous gravely to mention in *Lilburn*'s caſe, *an order to tranſmit the reſolution to the Lords*, as an end which would juſtify the reſolution, or as the cauſe of its being made: and, in Sir *L. Jenkins*' caſe, *the ordering thoſe who had given the information into cuſtody*, as what gave a propriety

to

time in weaving or deſtroying ſuch cobweb Arguments and diſtinctions.

In Contradiction to the *Conſiderer*'s Aſſertion, I will affirm, that *the Queſtion of the Legality of the Warrant is not now* ſub judice, *nor in a courſe of legal determination.* There is no bill of Exceptions, either ſettled or ſealed, where this point is made; nay farther, there is no Bill of Exceptions or Cauſe, now in agitation, where this point can be made: ſeeing, in the firſt place, according to their own account, it muſt be ſhewn, that the ſecretary of ſtate is a Juſtice of Peace within the meaning of the Statute; and next, that there was a probable cauſe for arreſting Mr. *Leach*, &c. before the legality of the war-

R rant

to the reſolution, damning the commitment as illegal? Would the reſolution condemning general warrants be rendered more ſalutary, conſtitutional or effectual, by a ſubſequent order to tranſmit it to the Lords, or by ordering *Money*, *Watſon*, &c. into cuſtody, or to aſk pardon on their knees, at the bar of the Houſe? The *Conſiderer* aſſumes, that the Houſe does not reſolve the law upon a general point, *unleſs when it immediately ariſes from or tends to ſome other act of parliamentary proceeding.* Now, apply this to Lord Danby's caſe. What did the reſolution there ariſe from? A mere complaint of his being groundleſly taken up. What act of parliamentary proceeding did it tend to? A declaration of the illegality of the warrant. What *other* act did it lead to or end in? None at all. The *order*, to aſk the Secretary again *when* he received the information, on which the warrant was grounded, can in no ſenſe be called ſo. It was a part of the ſame thing. This order too was made the ſame day with the reſolution, and is never afterwards mentioned in the journals. The apprehenſion of Lord Danby was a breach of privilege, becauſe there was no information on oath to ground it. If there had, as the warrant purported to be *for treaſonable practices*, will the Conſiderer ſay, that the apprehenſion would have been a breach of privilege, when a member may be apprehended even for a libel? It is amazing, that a ſubtle man, as this *exotic* writer (as well as his parliamentary clerical auxiliary) certainly is (tho' no great lawyer) ſhould offer ſuch mere cobweb for reaſoning! His friends, the miniſtry, would have oppoſed the motion as diſorderly and inadmiſſible had it been ſo, and not have received, amended, and ſhaped it, and finally adjourned it only. And pray, how can any body determine that the reſolution, damnatory of general warrants, will not be followed by an *addreſs* to the king, to deſire his majeſty would direct this reſolution to be communicated to the privy council and the ſecretaries offices, to the end, that no more ſuch warrants may for the future be iſſued from thence; and by an *order* that this *addreſs* ſhould be preſented to his majeſty, by ſuch members as are of his privy council. The reſolution would then *tend to an other act of parliamentary proceeding*, would be followed by *a directory vote*, and by *an order* which is the *final and executive*

rant itſelf can at all come in queſtion, or be material. So that, let the frame of the warrant have been ever ſo legal, unleſs the perſon who iſſued it was a Juſtice of Peace within the words of the act of Parliament, and unleſs there was alſo a probable cauſe for apprehending Mr. *Leach*, &c. the perſons who executed the warrant are not juſtifiable, any more than the Secretary who iſſued it. Now, there is not the leaſt colour in *law* for maintaining, that any man as Secretary of State is a ſtatutable Juſtice of Peace; and neither a pretence in law, nor the ſhadow of a *fact* to prove Mr. *Leach*, &c. to be the Author, Printer, or Publiſher, of No. 45, nay the Jury found the contrary: and yet not one, but both of theſe matters, muſt be fully eſtabliſhed, before the warrant itſelf can come under conſideration. For, I cannot believe, until I ſee it actually come to paſs, that any Court, out of complaiſance to any advocate, will invert the order of things, and conſider that point firſt which is laſt in courſe, and

ecutive act of the Houſe; ſo that the *Conſiderer*'s rules, or clerk-like formalities, may be eaſily complied with in the preſent caſe, if any man can *really* think they will add aught to the weight or propriety of the reſolution itſelf. But, if he ſhould farther add, That the reſolution muſt likewiſe *ariſe* from ſome other parliamentary proceeding, it being impoſſible to correct it now with any thing that paſſed the laſt ſeſſion (albeit the queſtion was only adjourned then) eſpecially as the complaint againſt Mr. *Webb* and Mr. *Wood* is totally diſcharged: I can tell him that, in my apprehenſion, it is not too late to move a complaint againſt the ſecretary himſelf, which perhaps, would have been at firſt the moſt becoming the dignity of a houſe of parliament, and the moſt conſtitutional (altho' not the moſt reſpectful, complaiſant or tender) way of proceeding; and therefore, it is worthy the conſideration of adminiſtration, whether the ſimple, independent reſolution, ſhould it be moved again, will not, every thing conſidered, be for themſelves the moſt eligible of all. The exotick compiler of the metaphyſical *conſiderations* need be under no concern about its regularity. It will be perfectly regular. Otherwiſe, let me aſk him, how That momentous reſolution touching an *Engliſh* parliament's right of taxing the colonies could be juſtified? It was an independent, ſubſtantive reſolution, followed by nothing; and yet was a reſolution not only of extreme magnitude, but of the moſt general and higheſt legal nature, involving in it a deciſion of the firſt and moſt fundamental principles of liberty, property, and government; and was alſo well worthy, as to the temporary policy of it, the moſt ſerious of all conſideration. This was reſolved too, if I am informed right, at the cloſe of the night, and at the riſing of the houſe: ſo that every body muſt have taken it as a clear thing, that they could at any time come to a reſolution upon any *general point of law*, whenever they ſhould ſee it expedient ſo to do.

and which can only operate at all in favour of the Defendants, after the former have been eſtabliſhed. A hardy aſſertion to the contrary gains no credit, when it ſtares common Senſe in the face, nor has it any other effect than that of turning ones eyes with aſtoniſhment and indignation upon the deſperate aſſertor. It is I allow, commonly ſaid, that *if Truth be againſt a Man, he will be againſt Truth*; but then there ſhould be ſomething in the way of ſaying that will put a gloſs upon the matter, in order to obtain a momentary credit to it. Above all, ſuch crazy ſtuff ſhould never be committed to paper, and penned as the queſtion of debate, for the botchery will be preſently ſeen through, and the unſkilful *tinker* damned. However, I will further venture to affirm, with reſpect to the legality of the warrant, that no *Engliſh* lawyer thinks the *point of magnitude* for its difficulty, requiring learned diſcuſſion, or *mature conſideration:* although many a man might be of opinion, when the liberty and property of a repreſentative of the community were broken in upon by a miniſter of the Throne, Parliament would interfere, that the privileges of the Legiſlature might be vindicated with dignity, that is, by the Legiſlature itſelf; the private remedy of action or indictment being too ſmall for ſome caſes, and the ordinary Courts of Juſtice too feeble to cope with ſome malefactors.

The *Conſiderer* may miſrepreſent and then contemn, if he pleaſes, my way of Reaſoning about the Seizure of Papers, let him but agree with me in the Law upon that head. I write not for the ſake of Abuſe or Altercation, but of the juſt liberties of Engliſhmen. I deſire to offend no man, who does not counteract or betray them, and I care not whom I offend that does, or attempts to do, either. In the reign of Charles the Firſt, the Commons reſolved, " That the Searching and Sealing of the " Chambers, Studies, and Papers, of Mr. Holles, Mr. " Selden, and Sir John Elliot, being Members of Par- " liament, and iſſuing out Warrants for that purpoſe, are " Breaches of Privilege:" And alſo, " That Mr. Lau- " rence Whittacre, being a Member of Parliament, " quarto Caroli, and entering into the Chamber of Sir " John Elliot, being likewiſe a Member of that Parlia- " ment, Searching of his Trunk and Papers, and Sealing

" of them, is guilty of a Breach of Privilege of Parlia-
" ment, this being done before the Diſſolution of the
" Parliament."

The *Conſiderer* indeed ſays, " he cannot form to his " imagination any legal or political reaſon, even in " high treaſon or other public danger, for the general " and undiſtinguiſhing ſeizure of papers."

This carries a very handſome appearance with it. But then, in page 13, he aſſerts, that " the proſecutor is at " liberty to avail himſelf of whatever he can find in the " houſe or on the perſon, to prove the truth of his " charge." Now, how is this conſiſtent with the foregoing or founded in notions of law? For, without information on oath affecting particular things, nothing can in any caſe be touched or examined, much leſs ſeized and carried off. Let the contrary be admitted, and whenever an Attorney General ſhall think fit to file an information, or a Secretary of State to take up any man, be it ever ſo groundleſsly, his houſe and all his papers may be rummaged and gutted by this ſort of law, that is, upon mere political ſuſpicion, in order either to fiſh for evidence really to prove him a libeller, or elſe for the ſake of other intelligence, which a jealous miniſter may want or wiſh for and not know otherwiſe how to come at. Every private paper, according to this doctrine, might be ſcrutinized by the examiner; for, without doing ſo, how could he determine whether ſomething could not be proved from thence? and yet, no information all this while on oath might be given either to Mr. Attorney or Mr. Secretary. In a word, once admit the principle, and all the conſequences of an unlimited State Inquiſition follow of neceſſity. But, it is really abſurd to ſuppoſe This can be law, when nothing can be taken from any man, in a legal way, without ſome ſpecific criminal charge againſt it founded on oath, or on the view of the magiſtrate or apprehender accompanying the criminal fact.

He then proceeds very fillily to ſuppoſe, that evidence will not be admiſſible, if got by violence, and aſks a fooliſh queſtion upon this ſtrange ſuppoſition. But *quod fieri non debet, factum valet*, an unlawful manner of coming by papers will not prevent their being evidence when produced. The only thing that is plain from this raw

writer

writer is, that he himſelf has no certain notion about the matter at all.

He allows, that when a Jury finds a man guilty of murder or a libel, they pronounce him guilty of *that fact which the law* calls a murder or *a libel*, and ſays, that *beyond thoſe bounds the Jury have nothing to do with the law.* This is enough for my preſent purpoſe, and therefore it is not neceſſary for me to ſcan the whole of his law-doctrine, however exceptionable it may be, concerning Jurors; altho' the old books moſt certainly ſay the Jury are judges of the law, as well as the fact, in all caſes, *if they pleaſe to take it upon themſelves. Lilburn*, it is very well known, immediately after his acquittal, publiſhed his trial, and in a remarkable frontiſpiece prefixed to it, proclaimed to the world that he had been acquitted by the integrity of his jury, *who were judges of the law as well as the fact.* It perfectly amazes me, that the *Conſiderer* ſhould work himſelf up to affirming, *it is contrary to their oath*, when any man need but read it to ſee there is not the ſemblance of a foundation for ſo ſcandalous and wanton an aſſertion. Indeed, his conceptions in general of juries ſeem by much too lowly and contemptuous, owing I preſume to his education on the northern ſide of the *Tweed*, where very little uſe is made of them, the law of the country ſervilely treading after that of Imperial *Rome* which was calculated for empire and vaſſalage, and not for freemen or a commonwealth. A like prejudice has drawn ſome other people into many a ſcrape, which but for this I fancy they would not have fallen into.

In ſtrictneſs, the Law of *England* in a judicial way knows no other *proof* but before a Jury and by record.

If a man, for example, conceives himſelf alluded to in any defamatory writing, altho' not named nor perſonally deſcribed, eſpecially where the character he imputes to himſelf is ſuppoſed of ſome future age, He muſt take the ſenſe of a Jury upon it. A Judge cannot determine the matter; it is not within his power, it is no part of his province, to aſcertain an innuendo: nor can the party himſelf be examined, for nobody is required by our laws to furniſh evidence againſt himſelf. In ſhort, as no Starchamber exiſts at preſent, ſo nobody can be puniſhed upon the mere preſumption of the King's

King's Judges; nor can a diſcovery be forced from the party by any torture of examination or confeſſion. Twelve indifferent men, his fellows, muſt find on their oaths, that the writing complained of was knowingly and malicioufly put forth by the accuſed in contempt and diſparagement of the Accuſer. This is the only legal proof in ſuch caſe, whereon any judgment can be founded.

So nice were our anceſtors, after the Revolution, even with reſpect to innuendos confirmed by the verdict of a jury, that the Lords in reverſing the judgment againſt Sir *Samuel Bernardiſton*, declared "The informa-"tion, being grounded upon *Letters*, which in them-"ſelves were not material, but made ſo by innuendos or "ſuppoſed or forced conſtructions, ought not to be al-"lowed; for, all accuſations ſhould be plain, and the "crimes aſcertained."

In good faith, no *Engliſhman* ſhould be conſtrued or innuendoed into a fine or a jail even by a Jury, muſt leſs by a Judge, without any trial whatever by his peers. Who is meant or what is meant by any writer is in every caſe to be reſolved by his Country. No affidavits will ſerve the purpoſe. And, whenever a contrary doctrine ſhall take place, the Conſtitution of this country will ſoon be deſtroyed, and the liberty of every man in it lie at the mercy of his Majeſty's Judges. Is this what any man deſires or will yet a while endure? It will not only be over with the true Engliſh Conſtitution; but a man may boldly ſay *actum eſt de republica*. Perchance too, *Chaos will* not *come again*, for I am afraid of a much worſe thing, and that is lifeleſs ſlavery. The time will then exiſt which the modern *Britiſh* Hiſtorian only feigns of our generous Anceſtors, when parliaments will be conſidered as an *ornament* and not as *eſſential* to the State, and no *lawyer* have even an *idea of Liberty*; for, according to him, the exuberant happineſs of Engliſhmen under the firſt *Stuart* made them rich and wanton, and that wantoneſs gave riſe to extravagant notions, and theſe at length, by jumbling inceſſantly together, fell caſually into the ſhape of political freedom, and thus in the golden reign of this Scottiſh Solomon, the notion of an *Engliſh* conſtitution was ſomehow, and for the firſt time, conceived, produced or made.

Not

Not only the reaſon of the thing, but hiſtory, warrants me in foreboding this conſequence from ſuch tenets. In the days of our ſecond Scottiſh prince, Charles the martyr, when our old *Magna Charta* liberty was ebbing very faſt, and this antient conſtitution verging to an end, the Starchamber lifted its creſt higher than ever, and ſuperceded the uſe of Juries and all other Judicatories. The *ſecond day of Hilary Term*, 1637, an Information was preferred in the Starchamber by the King's *Attorney-General* againſt *Lilburn* and Warton, for the unlawful printing, publiſhing and diſperſing of libellous and ſeditious books, contrary to the decree of that Court, which was verified by *Affidavit*. They were brought up to the *Office*, but refuſed to take an oath to anſwer *interrogatories*, ſaying it was the oath *ex officio*, and that no freeborn *Engliſhman* ought to take it, not being bound by the law to accuſe himſelf. Their Lordſhips nevertheleſs ordered, "the oath to be tendered again, and again, in open court," and the delinquents ſtill refuſing it, and to be examined, "adjudged them to be guilty of a very high *contempt* and offence of dangerous conſequence and evil example, and worthy to undergo very ſharp, ſevere and exemplary cenſure, which might deter others from the like preſumptuous boldneſs in refuſing to take a legal oath, without which many great and exorbitant offences, to the prejudice and danger *of his Majeſty*, his kingdoms and loving ſubjects, might go away undiſcovered and unpuniſhed;" and therefore ordered them to be *committed* to the Fleet *until they ſhould conform*, and to pay 500l. apiece, and before their enlargement to become *bound with good ſureties for their good behaviour*; that *Lilburn* ſhould be whipt through the ſtreets from the Fleet to the Pillory, and from thence be returned to the Fleet, there to remain according to this decree. In April, *Eaſter Term*, this ſentence was rigorouſly executed. But *Lilburn*, whilſt he was whipt at the cart and ſtood in the Pillory, ſpoke irreverently and toſſed about pamphlets. The Starchamber, then ſitting, being informed of this, immediately ordered him to be gagged, and made a further order, "that he ſhould be laid alone with irons on his hands and legs, in the wards of the Fleet, where the baſeſt and meaneſt ſort of priſoners are uſed to be put, and that *the warden* of the Fleet

Fleet *ſhould* take eſpecial care to *hinder the reſort of any perſon whatſoever to him*, and particularly that he ſhould not be ſupplied with any hand, and to take ſpecial notice of all letters, writings and books brought unto him, and to ſeize them, *and to take notice from time to time who they be that reſort to the ſaid priſon to viſit the ſaid Lilburn, or to ſpeak with him, and to inform the board.*" Their Lordſhips further ordered, "that the Attorney and Solicitor General ſhould ſtrictly examine *Lilburn* whether he did, during the time of his whipping and ſtanding in the Pillory, utter any, and what ſpeeches *tending to ſedition or to the diſhonour of the ſaid Court of Starchamber, or any member of the ſaid Court*, and who heard them; and whether he threw about any and what ſeditious books and pamphlets, and of whom he had them; and what other material circumſtances they ſhall think fit to examine upon, for better finding out the truth, and thereof to make certificate with their opinions." *Lilburn* in conſequence of this, continued in priſon till November 1640, when the firſt parliament begun, and then he was releaſed. And upon the tranſmiſſion of the caſe from the Commons with the Starchamber ſentence, the Houſe of Peers, after an examination of the whole proceedings, and a due conſideration of the ſentence, adjudged, "that the ſame and all proceedings thereon ſhould forthwith be vacated, obliterated and taken off the file, *as illegal and moſt unjuſt, againſt the liberty of the ſubject and the law of the land and Magna Charta, and unfit to remain upon record.*"

To all the Conſiderer ſays, with reſpect to Juries, it is a ſufficient Anſwer, that, Whether any Paper be *a Libel tending to &c. againſt the Peace*, if at all a matter of law, it is that ſort of matter of law which is *neceſſarily blended with fact*, and therefore, according to him, is the proper province of a jury. And altho' he repreſents the people likely to be equally partial with the court, I do not conceive where or how that can happen, unleſs a court ſhould at any time diſcontent or act againſt the whole people, and that is a caſe I cannot ſuppoſe. The conteſt, in a public libel, lies between the miniſtry and ſome particular people, therefore, the jury, unleſs taken from among thoſe very people (which cannot be) may be very impartial, altho'

the

the court cannot be ſo. After ſaying this, I ſhall leave the Conſiderer the uninterrupted ſatisfaction of aſſerting *Truth* to be a crime in a public libel, and of inſinuating, that it is better the writer ſhould be puniſhed on that account, than the perſon truly charged by him be expoſed, altho' he were even guilty of a capital crime. Let him, if he will, lay down this to be good law in a *criminal* proſecution, but not to be ſo in a *civil* action, againſt a ſuppoſed libeller. Indeed, in a note on this part of his performance, he declares a libel to be a crime upon this principle, that "whatever carries a preſent "injury to the peace of another, does ſo to the peace "of the ſtate;" ſo that, by this way of reaſoning, whatever breaks the peace of mind of any old woman is a breach of the public peace of the kingdom. But this enthymem reverſes the rule of logic,

Syllogizari non eſt ex particulari,

or, as a Chriſt Church-man would ſay, *ex aliquo non ſequitur omne.* The poſition, in reality, is new and ſo extenſive, that let any man have a hand in detecting the conduct of a political knave, and by virtue of it, he will be amenable to a *criminal* court for ſuch his proceeding, as if it were really a malverſation. The Conſiderer ſays very truly (I believe) "this principle ſeems at "firſt to have taken place with a view to bring libels to "the juriſdiction of the Starchamber;" but, I hope, he would not, from his particular approbation of it, or out of reverence to that aboliſhed court, adviſe or endeavour the introduction of it into the *King's Bench.* I am obliged to him, however, in the ſame place, for admitting, that the principle on which judges and legal writers hold a libel to be *criminal, is its tendency to a breach of the peace*; becauſe, what only tends to, cannot be itſelf, a breach of the peace, as the thing tending to cannot be one and the ſame with the thing tended to; and conſequently ſuch tendency cannot by any poſſibility be an *actual* breach of the peace. Having ſaid this, I will now take my farewel of my flimſy antagoniſt, and hope another time he will be convinced, that plain fact and common ſenſe, are not to be overcome by metaphyſical quiddities and unſubſtantial forms. The preſent argument, let me aſſure him, is above his

encounter, and he will do well upon a future occaſion, as well as his abettors, to

——————remember *Milo*'s end,
Wedg'd in that timber which he ſtrove to rend.

Jan. 24, 1765.

APPENDIX.

To the Printer of the PUBLIC ADVERTISER.

SIR,

IN your paper of Saturday laſt, among the articles of news, there are no fewer than four to acquaint the world of "the *King's Bench*, on the *firſt* paper-day of this term, having *unanimouſly* affirmed the judgment of the Common-Pleas in the cauſe of *Leach*, that by this *important* deciſion he will recover his damages and coſts, that this is the *firſt final* determination in the matter, that many other cauſes depended upon it, and that the cauſe between Mr. *Wilkes* and Mr. *Wood*, *it is apprehended*, will be ended *this term*." The very ſame four ſucceſſive articles, in ſo many words, are likewiſe in the Gazetteer of the ſame Day.

The information gave me pleaſure, altho' I did not ſee how this judgment of the King's-Bench could be called the firſt or the final determination, as the matter came there by appeal from another court, and this very determination was liable itſelf to be carried for error before the Houſe of Lords;——unleſs, indeed, the authors of the original groundleſs, vexatious exceptions ſhould have changed their minds lately in any reſpect upon the point, and be more diſpoſed to be ſatisfied now than they were formerly. But, the News-writer giving alſo the title of *important deciſion* to this recent adjudication, I took the liberty of enquiring among the practiſers, what were the ſeveral material points of law that were decided by this important judgment. They anſwered, to my ſurprize, that the intelligence, publiſhed with ſuch an air of authority, was wholly deceitful, and that no one point of law whatever was adjudged. The truth of the matter, as they told me, was merely this;---

By the ſtate of the evidence in the bill of exceptions it appeared, that the Meſſengers and Conſtable had a warrant to arreſt the Authors, Printers and Publiſhers of the

North

North Briton, No. 45, with their papers, that they arreſted the plaintiff *Leach*, and that *Leach* was neither Author, Printer nor Publiſher of that paper. The court thereupon gave judgment, or rather affirmed the former ſentence, againſt the defendants, the meſſengers, &c. for having arreſted the plaintiff without any authority for ſo doing, or, in other words, for having acted in diſobedience to their warrant.

Now upon this caſe no points of law could ariſe, at leaſt not thoſe important points which the public have been ſo long wiſhing to have decided, and it would have been unuſual, as well as totally unneceſſary, to enter into or deliver an opinion upon any of them. The plaintiff here was evidently not within the ſpirit or the letter of the warrant, being neither generally nor ſpecially deſcribed, in ſhort no object of it at all, and conſequently there could be no room for conſidering what would have been the legal effect of his being ſo, that is, of a caſe the very reverſe of that which was in judgment.

It was therefore when this caſe was firſt argued, upon the warm revival of it which accidentally happened (if I miſtake not) juſt after the riſing of the parliament and the change of the miniſtry, a moſt unexampled grace and extraordinary indulgence of the court, to gratify the bar with declaring its opinion with reſpect to the illegality of General Warrants. For, when theſe were made a topic of argument by the advocate in the matter, it was ſo apparently in ſpite of all propriety, and with ſo little neceſſity, that the byeſtanders at the time imagined ſome wager muſt have been laid, or ſome general public undertaking entered into, that all this ſhould ſome how or other be brought about.

In was indeed pretended ſeveral months ago, that this queſtion of the legality of General Warrants might be fairly come at in the preſent caſe, by ſhewing that there was a probable cauſe for arreſting Mr. Leach, that is, ſuch ſuſpicious circumſtances attending him, as would induce any officer to believe him an object of the warrant, that a probable cauſe would juſtify the arreſt of a wrong perſon, and that therefore the only material queſtion muſt be upon the validity of the warrant which happened to be a general one. But, in the firſt place, it turned out unfortunately, that the Jury did not find any ſuch ſuſpicious circumſtances as could be deemed a probable

cauſe;

cauſe; and, in the next place, it is an indiſputable, primary tenet in our law, that no probable cauſe whatever will juſtify a tortious and falſe arreſt, the ſame being wholly illegal, wrongful and unjuſtifiable. It is at your own peril that you deprive any freeman of his liberty. The circumſtances that miſled you into ſuch an act of injuſtice can only be made uſe of in mitigation of damages. The forementioned pretences therefore being neceſſary preliminaries to be eſtabliſhed before the validity of the warrant itſelf could be diſcuſſed, and they being mere cobweb and incapable of being eſtabliſhed, it would be quite eccentric to run into a judicial conſideration of the legality of the warrant itſelf, upon ſuch premiſes.

But, how this whole matter has proceeded, even a child may diſcern; & *verbum ſapienti ſat eſt.*

Nevertheleſs, altho' no points of law touching this caſe were decided on Friday laſt, nor could indeed the ſame be expected, in the *King's Bench*; yet, it is reported, that the court of Common Pleas in another cauſe have every one of the great legal queſtions, which have ſo long agitated the people of England, and are of ſuch infinite conſequence to civil liberty, now fully in judgment before them, after ſeveral ſolemn arguments at the bar, and that the Judges there cannot well avoid delivering their opinions, within the preſent term. *Hic murus aheneus eſto.* I am, SIR,

Gray's-Inn,
Nov. 11, 1765.

Intirely, &c.
C.

ERRATA.

Page 7, line 6 from the bottom, read *the King was not immediately*, &c. page 9, line 20, for *however*, read, *indeed*. And the four laſt lines of the ſame page thus, " or publiſher. And yet after all, I do not " learn by what certain ſigns one can know, whether any particular " pamphlet or paper will induce any reader to commit a breach of the " peace or not." Page 16, line 9 from bottom, dele *in*. page 18, line 10 from bottom, for *now* read *and yet*. page 19, line 16 from bottom, for *but* read *altho'*. page 20, line 8 from top, for *ſtill* read *has always*. The quotation in page 30 is from Clarendon's ſtate letters. page 32, laſt line, for *debauches* read *debauchees*. page 33, line 9, for *theſe* read *theſe*.' page 34, line 15 from bottom, for *their* read *his*. page 35, line 14, for *or* read *nor*; and next line, for *favoured* read *favoured*. page 36, line 9, read, *and he projected*, &c. page 44, line 7, read, *but at a falſe*, &c. page 46, line 10, read, *can call it no more*, &c. and line 22, for *levied* read *levelled*. The quotation in this page is from the Lords Journals. page 66, line 10 from bottom, for *quæſitum* read *quæſitam*. page 67, line 16, for *confeſſed* read *confeſſedly*. page 80, line 3 from bottom, read *any thing like it*. page 82, line 3 from bottom, for *uſe* read *are*. page 96, line 13, read, *a ſmiling countenance (nimium lubricus) do not*, &c. page 98, line 4 from bottom, for *where* read *were*. page 99, line 4, for *corporate* read *parliamentary*.